

No. 11236

United States
Circuit Court of Appeals
For the Ninth Circuit.

BOWER-GIEBEL WHOLESALE CO., a co-
partnership composed of Earl E. Bower and
Walter Hamilton Bower,

Appellant,

vs.

SEARS-ROEBUCK & CO., a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

MAILED
MAY 22 1946

PAUL P. O'BRIEN,
CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer to Complaint and Counter-Claim.....	15
Appeal:	
Certificate of Clerk to Transcript of Record on	50
Notice of	48
Order Eliminating Exhibits from Printed Record on	377
Statement of Points and Designation of Record on	374
Stipulation re Record on	49
Bond on Removal	8
Certificate of Clerk of Superior Court to Removal Papers	13
Certificate of Clerk to Transcript of Record on Appeal	50
Complaint	2
Decision and Order for Judgment.....	30
Designation of Record, Statement of Points and	374
Findings of Fact and Conclusions of Law.....	38
Judgment	44

ii. *Bower-Giebel Wholesale Co. vs.*

	INDEX	PAGE
Minute Orders:		
May 15, 1944—Continuing Hearing		11
May 18, 1944—Granting Petition for Re- moval and Approving Bond		12
Sept. 10, 1945—Denying Motion for New Trial		48
Motion for New Trial		45
Names and Addresses of Attorneys		1
Notice of Appeal		48
Objections to Proposed Findings, Conclusions and Judgment		34
Order Denying Motion for New Trial		48
Order Eliminating Exhibits from Printed Rec- ord		377
Order of Removal to United States District Court		12
Petition for Removal		5
Reply to Counter-Claim		24
Statement of Points and Designation of Rec- ord on Appeal (DCA)		374
Stipulation re Record on Appeal		49
Transcript of Testimony and Proceedings		52
Witnesses for Defendant:		
Adams, Eva		
—direct		223
—cross		227

INDEX	PAGE
Witnesses for Defendant—(Contd.)	
Arnold, William L.	
—direct	249
—cross	261
Andersen, Edna	
—direct	78
—cross	89
—redirect	95
—recross	97
Ashby, Ralph Parker	
—direct	53
—recalled, direct	99
—cross	106
—redirect	137
—rebuttal, direct	360
—cross	364
—redirect	369
Bemis, Oliver J.	
—direct	208
—cross	213
—redirect	216
Benson, Barbara	
—direct	200
—cross	206
Besch, Elizabeth H.	
—direct	192
—cross	198

INDEX	PAGE
Witnesses for Defendant—(Contd.)	
Erhart, Alphonse	
—direct	164
—cross	172
—recalled, cross	263
—redirect	263
Friedland, Ida	
—rebuttal, direct	370
Hibbs, Ellen	
—rebuttal, direct	372
Murrell, Frances	
—direct	230
—cross	236
Pelster, Marie V.	
—direct	180
—cross	187
—redirect	190
Pocius, Victor	
—direct	138
—cross	150
Theaker, Morley L.	
—rebuttal, direct	350
—cross	356
Von Krog, Evelyn	
—direct	217
—cross	222

INDEX	PAGE
Witnesses for Defendant—(Contd.)	
Wade, Amy	
—direct	240
—cross	244
Witnesses for Plaintiff:	
Bower, E. Carlton	
—direct	347
Bower, Earl E.	
—direct	290
—cross	327
Clark, Howard P.	
—direct	286
—cross	289
McCance, Josephine	
—direct	346
Mitchell, R. E.	
—direct	265
—cross	275
—redirect	281
—recross	285
Saxe, Ray	
—direct	339
—cross	343
—redirect	345

NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles 14, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript.

In the Superior Court of the State of California in
and for the County of Los Angeles

No. 492465

BOWER-GIEBEL WHOLESALE CO., a co-
partnership, composed of EARL E. BOWER &
WALTER HAMILTON BOWER,
Plaintiff,

vs.

SEARS-ROEBUCK & CO., a Corporation, DOE
ONE AND DOE TWO,
Defendants,

COMPLAINT

MONEY

I.

That the true names of defendants Doe One and Doe Two, are unknown to plaintiff who prays leave to amend this complaint by inserting said true names herein when same are ascertained.

II.

That at all times herein mentioned the plaintiff was, and now is, a co-partnership composed of Earl E. Bower & Walter Hamilton Bower, who have heretofore filed with the County Clerk of Los Angeles County, State of California, their business certificate showing the ownership of such business, and have published said certificate as required by and in compliance with Section 2466 and 2468 of the Civil Code of the State of California. [2]

III.

That the defendant, Sears-Roebuck & Co., is a corporation duly organized and existing under and by virtue of the laws of the State of New York and that it has filed, and is duly authorized to do business in the State of California and has filed a copy of its certificate in the County of Los Angeles.

IV.

That the transaction herein sued upon were contracted for and payable in the County of Los Angeles, State of California.

V.

That within two years last past, defendants became indebted to plaintiff for goods, wares and merchandise sold and delivered to and services rendered to defendants at their special instance and request, in the agreed and reasonable value of \$7,738.99, which said sum defendants promised to pay together with interest thereon at the rate of 7% per annum from January 14th, 1944.

VI.

That demand has been made for payment of said sum, but that no part thereof has been paid and the whole thereof remains due, owing and unpaid.

For a Second Cause of Action, Plaintiff alleges:

I.

Realleges all the allegations of Paragraphs I, II, III, IV and VI of the First Cause of Action as if herein specifically pleaded.

II.

That within four years last past the defendants became indebted to plaintiff for a balance due upon an open book account in the sum of \$7,738.99 which amount defendants agreed to pay together with interest thereon at the rate of 7% per annum from January 14, 1944. [3]

For a Third Cause of Action, Plaintiff alleges:

I.

Realleges all the allegations of Paragraphs I, II, III, IV and VI of the First Cause of Action as if herein specifically pleaded.

II.

That within four years last past an account was stated between plaintiff and defendants, whereby the sum of \$7,738.99 was found to be due to plaintiff from defendants, which said sum defendants then agreed to pay together with interest thereon at the rate of 7% per annum from January 29th, 1944.

Wherefore, plaintiff prays judgment against the defendants and each and all of them in the sum of \$7,738.99 with interest thereon at the rate of 7% per annum from January 29, 1944; for costs of suit incurred herein and for such other and further relief as to the Court may seem just and proper in the premises.

(Signed) JEROME D. ROLSTON

Attorney for Plaintiff [4]

State of California,
County of Los Angeles—ss.

Earl E. Bower, being by me first duly sworn, deposes and says that he is the partner of the plaintiff in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

(Signed) EARL E. BOWER

Subscribed and sworn to before me this 6th day of April, 1944.

[Seal] JEROME D. ROLSTON
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed April 12, 1944. [5]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL

Petition for Removal of Cause to the United States District Court for the Southern District of California, Central Division.

To the Superior Court of the State of California in and for the County of Los Angeles:

Your petitioner, Sears-Roebuck and Co., defendant in the above entitled cause, respectfully shows to this Court:

1. The above-entitled suit has been brought in this Court and is now pending therein.

2. Said action is of a civil nature at law and is brought to recover damages for breach of contract.

3. The controversy in said suit is between citizens of different states in that Bower-Giebel Wholesale Co., a co-partnership composed of Earl E. Bower and Walter Hamilton Bower, and each of said partners, was, at the time of the commencement of said suit in this court, and still is, a citizen of the State of California, and your petitioner, Sears-Roebuck and Co., was, at the time of the commencement of this action, and still is, a foreign corporation created and existing under the laws of the State of New York, and was and still is a resident and citizen of the State of New York and a non-resident of the State of California.

4. Said action is one in which the District Courts of the United States are given original jurisdiction. [6]

5. That the time within which your petitioner is required by the laws of this State and the rules of this Court to answer or plead to the Complaint in the above-entitled action has not yet expired.

6. The value of the matter in controversy in said action exceeds \$3,000, exclusive of interest and costs, as appears from the allegations of plaintiff's complaint.

7. Petitioner presents herewith a bond with good and sufficient surety that it will enter in the

District Court of the United States for the Southern District of California, Central Division, within thirty days of the date of filing of this petition, a certified copy of the record in this suit and that he will pay all costs that may be awarded by said District Court in case the said Court shall hold that this suit was wrongfully or improperly removed thereto.

8. Prior to the filing of this petition and of said bond for the removal of said cause, written notice of intention to file the same was given by petitioner to the plaintiff as required by law, a true copy of which, with proof of service of the same, is attached hereto.

Wherefore, petitioner prays that this Court proceed no further herein except to make an order of removal as required by law and to accept said surety and bond and to cause the record herein to be removed into said District Court of the United States within and for the Southern District of the State of California, Central Division, according to the statute in such cases made and provided.

Dated: May 5th, 1944.

SEARS-ROEBUCK AND CO.

By JOHN L. WHEELER

Attorney for Petitioner [7]

State of California,
County of Los Angeles—ss.

John L. Wheeler being by me first duly sworn, deposes and says: That he is the attorney for the

Petitioner; that petitioner is unable to make the verification because it is a foreign corporation and is absent from said county; for that reason affiant makes this verification on petitioner's behalf in the above entitled action; that he has read the foregoing Petition for Removal and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

JOHN L. WHEELER

Subscribed and sworn to before me this 5th day of May, 1944.

[Seal] DOROTHY MOSS

Notary Public in and for the County of Los Angeles, State of California

My Commission expires Nov. 25, 1946.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed May 6, 1944. [8]

[Title of Superior Court and Cause.]

BOND ON REMOVAL

Know All Men By These Presents, That Sears-Roebuck & Co., a corporation, as Principal, and the American Employers' Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, and duly authorized to transact business in the State

of California, as Surety, are held and firmly bound unto Bower-Giebel Wholesale Co., Plaintiff in the above entitled action, their successors or assigns, in the sum of Five Hundred and No/100 Dollars (\$500.00), lawful money of the United States of America, for the payment of which well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

The condition of the above obligation is such,
That

Whereas, Sears-Roebuck & Co., a corporation, the Defendant in the above entitled action, has applied, or is about to apply by petition to the Superior Court of the State of California, in and for the County of Los Angeles, for the removal of a certain cause therein pending wherein Bower-Giebel Wholesale Co., is the Plaintiff, and Sears-Roebuck & Co. is the Defendant, to the District Court of the United States for the Southern District of California, Central Division, for further proceedings on the ground in said petition set forth, and that all further proceedings in said action be stayed.

Now, Therefore, if the above named Defendant shall within [10] thirty (30) days from and after the date of the filing of said petition, enter in said District Court of the United States for the Southern District of California, Central Division, a duly certified copy of the record in the above entitled action, and shall pay or cause to be paid, all costs that may be awarded therein by the said District

Court of the United States, if such Court shall hold that such suit was wrongfully and improperly removed thereto, then this obligation to be void; otherwise to remain in full force and effect.

Dated and signed this 5th day of May, 1944.

[Seal] AMERICAN EMPLOYERS' INSURANCE COMPANY

(Signed) By P. J. GAUTHIER
Attorney-in-fact

State of California,
County of Los Angeles—ss.

On this 5th day of May, A.D., 1944, before me, Gladys M. Cooney, a Notary Public in and for said County and State, personally appeared P. J. Gauthier known to me to be the person whose name is subscribed to the within Instrument, as the Attorney-in-fact of American Employers' Insurance Company, and acknowledged to me that he subscribed the name of American Employers' Insurance Company thereto as principal and his own name as Attorney-in-fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] GLADYS M. COONEY,
Notary Public in and for said County and State
My commission expires Feb. 10, 1945.

The premium charged for this bond is \$10.00 per annum for the term thereof.

Bond approved May 15, 1944.

A. E. PAONESSA

Judge

Approved this 12th day of May, 1944.

H. C. SHEPHERD

Court Commissioner [11]

In the Superior Court of the State of California
In and for the County of Los Angeles

Honorable Alfred E. Poanessa, Judge Presiding.

[Title of Cause.]

MINUTE ORDER

(Entered May 15, 1944)

Petition and Bond of defendant Sears-Roebuck and Company for Removal to United States District Court, Southern District of California, Central Division, comes on for hearing; Jerome D. Rolston appearing as attorney for the plaintiff and John L. Wheeler for the defendant. Said matter is continued to May 15, 1944, Notice waived. [12]

In the Superior Court of the State of California
 In and for the County of Los Angeles

Honorable Alfred E. Paonessa, Judge Presiding.

[Title of Cause.]

MINUTE ORDER

(Entered May 18, 1944)

Petition and Bond of defendant Sears-Roebuck & Company for Removal to the United States District Court, Southern District of California, Central Division, comes on for hearing; Jerome D. Rolston appearing at attorney for the plaintiff and John L. Wheeler for defendant moving. Petition is granted and Bond approved. [13]

[Title of Superior Court and Cause.]

ORDER OF REMOVAL TO UNITED STATES
 DISTRICT COURT

Good cause appearing and there having been presented to the Court a petition and bond in due form for removal of the above entitled action to the District Court of the United States for the Southern District of California, Central Division, and it further appearing that written notice of said petition and bond for removal has been given plaintiff in the above entitled action prior to filing the same.

Now, Therefore, It Is Ordered:

1. That said petition for removal be and the

same hereby is granted, that the above entitled action be and the same hereby is removed to the District Court of the United States for the Southern District of California, Central Division.

2. That said bond presented herewith be and the same hereby is approved.

3. That the Clerk of this Court be and he hereby is ordered and directed to prepare a certified transcript and copy of the record herein to be filed with the said District Court of the United States in the manner and form as provided by law in such case.

4. That all proceedings in this Court in said cause be stayed.

Dated: May 15th, 1944.

A. E. PAONESSA,

Judge of the Superior Court

[Endorsed]: Filed May 15, 1944. [14]

State of California,
County of Los Angeles—ss.

I, J. F. Moroney, County Clerk and Clerk of the Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents consisting of the Complaint, Notice of hearing and filing petition for removal, Petition for Removal, Bond on Removal, Minute Order of May 11, 1944, continuing hearing, Minute Order of May 15, 1944, granting petition for removal, and written Order for Removal to the District Court of the

United States for the Southern District of California (Central Division), in the action of Bower-Giebel Wholesale Co., a co-partnership, composed of Earl E. Bower & Walter Hamilton Bower vs. Sears-Roebuck & Co., a corporation, et al, to be a full, true and correct copy of all of the original documents on file and/or of record in this office in the above entitled action to and including the date the motion was granted for Removal to the District Court of the United States, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 2nd day of June, 1944.

J. F. MORONEY

County Clerk and Clerk of the Superior Court of
the State of California, in and for the County
of Los Angeles

By S. M. MILEY
Deputy

[Endorsed]: Filed June, 1944.[15]

In the District Court of the United States, Southern District of California, Central Division

No. 3676-Y

BOWER-GIEBEL WHOLESALE CO., a co-partnership, composed of EARL E. BOWER & WALTER HAMILTON BOWER,
Plaintiff,

vs.

SEARS-ROEBUCK AND CO., a Corporation,
DOE ONE AND DOE TWO,
Defendants.

ANSWER TO COMPLAINT AND
COUNTERCLAIM

Comes Now the defendant, Sears-Roebuck and Co., and answering the complaint herein, admits, denies and alleges as follows:

I.

Alleges that the true and correct name of this answering defendant is Sears-Roebuck and Co.

II.

Answering Paragraphs II, III and IV of said complaint, admits the allegations thereof.

III.

Answering Paragraphs V and VI, denies generally and specifically said paragraphs and each and every allegation therein contained. [16] Further answering said paragraphs, denies that the de-

defendant was or is indebted to the plaintiff as alleged, or otherwise, or at all, or in the amount alleged, or in any other amount.

Answering Plaintiff's Second Cause of Action, this answering Defendant admits, denies and alleges:

I.

Answering Paragraph I of said Second Cause of Action, admits Paragraphs I, II, III and IV of plaintiff's first cause of action realleged in said paragraph; denies generally and specifically Paragraph VI of the first cause of action realleged in Paragraph I and each and every allegation therein contained. Further answering said paragraph, denies that the defendant was or is indebted to the plaintiff as alleged, or otherwise, or at all, or in the amount alleged, or in any other amount.

II.

Answering Paragraph II, denies generally and specifically said paragraph and each and every allegation therein contained; and further answering said paragraph denies that the defendant was or is indebted to the plaintiff as alleged or otherwise, or at all, or in the amount alleged, or in any other amount.

Answering Plaintiff's Third Cause of Action, this answering Defendant admits, denies and alleges:

I.

Answering Paragraph I of said Third Cause of

Action, admits Paragraphs I, II, III and IV of plaintiff's first cause of action realleged in said paragraph; denies generally and specifically Paragraph VI of the first cause of action realleged in Paragraph I and each and every allegation therein contained. Further answering said paragraph, denies that the defendant was or is indebted to the plaintiff as alleged, or otherwise, or at all, or in the amount [17] alleged, or in any other amount.

II.

Answering Paragraph II, denies generally and specifically said paragraph and each and every allegation therein contained. Further answering said paragraph, denies that the defendant was or is indebted to the plaintiff as alleged or otherwise, or at all, or in the amount alleged, or in any other amount.

COUNTERCLAIM

The defendant, for counterclaim herein, alleges:

I.

That the plaintiff, Bower-Giebel Wholesale Co., a co-partnership, composed of Earl E. Bower and Walter Hamilton Bower, is and has been for some time past engaged in the sale of candy and other confections in the County of Los Angeles.

II.

That the defendant, Sears-Roebuck and Co., is and has been for some time past engaged in the sale of general merchandise at retail, including

candy and confections in the County of Los Angeles; that the plaintiff, knowing of the retail business in which the defendant was and is engaged and knowing that the defendant desired to purchase candy to be used in defendant's retail business, on or about October 20th, 1943, sold to the defendant 28,000 pounds of chocolate pecan fudge to be used by the defendant in said retail business to the knowledge of the plaintiff; and the plaintiff then and there warranted the same to be of merchantable quality and in all respects fit and proper for such use.

III.

That the defendant relied upon said warranty and attempted to [18] use said candy for the purpose aforesaid, but that the same, when offered for sale, proved unfit for sale at retail in that it was moldy and otherwise unsuited for sale in defendant's retail business.

IV.

That as soon as said unfitness was ascertained, defendant notified the plaintiff thereof.

V.

That said fudge, as warranted, had a reasonable value to the defendant of 89c per pound for purposes of sale in defendant's retail business; that by reason of the unfitness of said candy for the purpose of sale at retail by defendant, defendant was and is damaged in the sum of \$10,358.02.

For a second, separate and further Cause of Counterclaim, Defendant alleges:

I.

That the plaintiff, Bower-Giebel Wholesale Co., a co-partnership, composed of Earl E. Bower and Walter Hamilton Bower, is and has been for some time past engaged in the sale of candy and other confections in the County of Los Angeles.

II.

That the defendant, Sears-Roebuck and Co., is and has been for some time past engaged in the sale of general merchandise at retail, including candy and confections, in the County of Los Angeles; that the plaintiff, knowing of the retail business in which the defendant was and is engaged and knowing that the defendant desired to purchase candy to be used in defendant's retail business, on or about October 20th, 1943, sold 28,000 pounds of chocolate pecan fudge to be used by the defendant in said retail business to the knowledge of the plaintiff; and the plaintiff then and there warranted, in accordance [19] with the established custom and usage of said confectionary trade in the County of Los Angeles, that the same was of merchantable quality and in all respects fit and proper for sale by defendant in its retail business.

III.

That the defendant relied upon said warranty and attempted to use said candy for the purpose aforesaid, but that the same, when offered for sale,

proved unfit for sale at retail in that it was moldy and otherwise unsuited for sale in defendant's retail business.

IV.

That as soon as said unfitness was ascertained, defendant notified the plaintiff thereof.

V.

That said fudge, as warranted, had a reasonable value to the defendant of 89c per pound for purposes of sale in defendant's retail business; that by reason of the unfitness of said candy for the purpose of sale at retail by defendant, defendant was and is damaged in the sum of \$10,358.02.

For a third, separate and further Cause of Counterclaim, Defendant alleges:

I.

That the plaintiff, Bower-Giebel Wholesale Co., a co-partnership, composed of Earl E. Bower and Walter Hamilton Bower, is and has been for some time past engaged in the sale of candy and other confections in the County of Los Angeles.

II.

That the defendant, Sears-Roebuck and Co., is and has been for some time past engaged in the sale of general merchandise at [20] retail, including candy and confections, in the County of Los Angeles; that the plaintiff, knowing of the retail business in which the defendant was and is engaged and knowing that the defendant desired to

purchase candy to be used in defendant's retail business, on or about October 20th, 1943, sold 28,000 pounds of chocolate pecan fudge to be used by the defendant in said retail business to the knowledge of the plaintiff; and the plaintiff then and there expressly warranted the same to be of merchantable quality and in all respects fit and proper for such use.

III.

That the defendant relied upon said warranty and attempted to use said candy for the purpose aforesaid, but that the same, when offered for sale, proved unfit for sale at retail in that it was moldy and otherwise unsuited for sale in defendant's retail business.

IV.

That as soon as said unfitness was ascertained, defendant notified the plaintiff thereof.

V.

That said fudge, as warranted, had a reasonable value to the defendant of 89c per pound for purposes of sale in defendant's retail business; that by reason of the unfitness of said candy for the purpose of sale at retail by defendant, defendant was and is damaged in the sum of \$10,358.02.

For a fourth, separate and further Cause of Counterclaim, defendant alleges:

I.

That the plaintiff, Bower-Giebel Wholesale Co., a co-partnership, composed of Earl E. Bower and

Walter Hamilton Bower, is and [21] has been for some time past engaged in the sale of candy and other confections in the County of Los Angeles.

II.

That the defendant, Sears-Roebuck and Co., is and has been for some time past engaged in the sale of general merchandise at retail, including candy and confections, in the County of Los Angeles; that on or about October 20th, 1943, the plaintiff offered to sell to the defendant 28,000 pounds of chocolate pecan fudge, and then and there produced and exhibited to the defendant certain samples of such chocolate pecan fudge so to be purchased by the defendant, and as an inducement to the defendant to make such purchase warranted and agreed that the 28,000 pounds of chocolate pecan fudge should be in all respects equal to the said samples.

III.

That the defendant, after examining said samples, purchased of the plaintiff 28,000 pounds of chocolate pecan fudge, and relying upon the plaintiff's said warranty and representation, agreed to pay therefor the sum of \$15,400.00.

IV.

That during the period from November 16th, 1943, until on or about December 6th, 1943, plaintiff delivered to and defendant accepted the delivery of said 28,000 pounds of chocolate pecan fudge; that upon examination defendant found and discovered that a substantial part of said fudge did not con-

form in quality to the sample and was not of merchantable quality but was in fact unsuitable and unfit for sale by defendant in its retail business.

V.

That defendant notified plaintiff of the character and condition of said candy as aforesaid; that defendant refused to take any action with reference to the candy. [22]

VI.

That said chocolate pecan fudge had a reasonable value of 89c per pound to defendant in its retail business if it was of a merchantable quality and free from defect, as shown by the sample; that by reason of its defective character and the failure of the 28,000 pounds of candy to conform with the quality and character of the sample, defendant was and is damaged in the sum of \$10,358.02.

Wherefore, defendant prays judgment against the plaintiff in the sum of \$10,358.02, with interest thereon at the rate of 6% per annum, for costs of suit incurred herein, and for such other and further relief as to the court may seem just and proper in the premises.

JOHN L. WHEELER,
Attorney for Defendant

Dated: June 8th, 1944.

(Duly verified.)

(Acknowledgment of Service attached.)

[Endorsed]: Filed June 9, 1944. [23]

[Title of District Court and Cause.]

REPLY TO COUNTER-CLAIM

Comes Now the Plaintiff and replying to the Counter-claim of the defendants, admit, denies and alleges:

I.

Answering Paragraph I of the First counter-claim, plaintiff admits each and every allegation contained therein.

II.

Answering Paragraph II of the First counter-claim, plaintiff denies generally and specifically each and every allegation contained in the last clause, beginning at Line 27, Page 3 of said Paragraph and further denies that they made any warranty of any type or description in connection with said merchandise; further answering said Paragraph, plaintiff admits all other allegations contained therein.

III.

Answering Paragraph III of the First counter-claim, plaintiff denies generally and specifically each and every allegation contained therein [26] and in this respect allege that the defendant relied solely upon their experience in connection with the sale of similar merchandise.

IV.

Answering Paragraphs IV and V of the First counter-claim, plaintiff denies generally and specifically each and every allegation contained therein and further denies that defendant was damaged in the sum of \$10,358.02 or any other sum or at all.

V.

Answering Paragraph I of the Second Cause of counter-claim, plaintiff admits the allegations contained therein.

VI.

Answering Paragraph II of the Second Cause of counter-claim, plaintiff denies generally and specifically each and every allegation contained in the last clause, beginning at Line 32, Page 4 of defendants Answer and counter-claim; further answering said Paragraph, plaintiff admits the other allegations contained therein.

VII.

Answering Paragraph III of the Second cause of counter-claim, plaintiff denies generally and specifically contained therein and in this respect allege that the defendant relied solely upon their experience in connection with the sale of similar merchandise.

VIII.

Answering Paragraph IV of the Second cause of counter-claim, plaintiff denies generally and specifically each and every allegation contained therein and further denies that defendant was damaged in the sum of \$10,358.02 or in any other sum or at all.

IX.

Answering Paragraph I of the Third cause of counter-claim, plaintiff admits the allegations contained therein.

X.

Answering Paragraph II of the Third cause of counter-claim, plaintiff denies generally and specifically each and every allegation contained [27] in the last clause, beginning at Line 7, Page 6 of defendants Answer and counter-claim; further answering said Paragraph, plaintiff admits the other allegations contained therein.

XI.

Answering Paragraph III of the Third cause of counter-claim, plaintiff denies generally and specifically each and every allegation contained therein and in this respect allege that the defendant relied solely upon their experience in connection with the sale of similar merchandise.

XII.

Answering Paragraph IV of the Third cause of counter-claim, plaintiff denies generally and specifically each and every allegation contained therein and further denies that defendant was damaged in the sum of \$10,358.02 or in any other sum, or at all.

XIII.

Answering Paragraph I of the Fourth cause of counter-claim, plaintiff admits each and every allegation contained therein.

XIV.

Answering Paragraph II of the Fourth cause of counter-claim, plaintiff denies generally and specifically each and every allegation contained in the

last clause, beginning at Line 11, Page 7 of said Paragraph and further denies that they made any warranty of any type or description in connection with said merchandise; further answering said Paragraph, plaintiff admits all other allegations contained therein.

XV.

Answering Paragraph III of the Fourth cause of counter-claim, plaintiff admits that defendant examined the samples and purchased the fudge therein described and further admit that defendant agreed to pay therefor, the sum of \$15,400.00; further answering said paragraph, plaintiff denies generally and specifically each and every other allegation contained therein.

XVI.

Answering Paragraph IV of the Fourth cause of counter-claim, plaintiff admits that it delivered and defendant accepted delivery of the said [28] 28,000 pounds of chocolate pecan fudge between November 16th, 1943, and December 6th, 1943, but further answering said Paragraph the plaintiff denies generally and specifically each and every other allegation contained therein.

XVII.

Answering Paragraph V and VI of the Fourth Cause for counter-claim, plaintiff denies generally and specifically each and every allegation contained therein and further denies that defendant was damaged in the sum of \$10,358.02 or in any other sum, or at all.

As and For an Affirmative Defense to the Counter-Claim and Each and All of Them, Plaintiff Alleges:

I.

That defendant has been in the retail business for many years and during its experience has retailed similar items to the one herein involved and defendant is familiar with its characteristics and with the case that should be exercised in preserving such merchandise.

II.

That if any of the candy referred to in each of the counter-claims contained in defendants answer was unfit, unsalable or not in merchantable condition or quality, such fact was a sole, direct and proximate result of the defendants negligence in handling same after they received and accepted same.

As and For a Second, Separate and Affirmative Defense to the Counter-Claim and Each and All of Them, Plaintiff Alleges:

I.

That each and all of said counter-claims fail to state a Cause of action for counter-claim.

As and For a Third, Separate and Affirmative Defense to the Counter-Claim and Each and All of Them, Plaintiff Alleges:

I.

That each and all of the counter-claims are barred by laches.

As and For a Fourth, Separate and Affirmative Defense to the Counter-Claim and Each and All of Them, Plaintiff Alleges: [29]

I.

That defendants waived its claims, if any they had, by their acts and conduct after receiving and accepting the merchandise described in each and all of said counter-claim.

As and For a Fifth, Separate and Affirmative Defense to the Counter-Claim and Each and All of Them, Plaintiff Alleges:

I.

That defendant is estopped from now asserting each and every claim set forth in its counter-claim and each and all of them by reason of their acts and conduct after receiving, accepting and examining the merchandise described in said counter-claim.

Wherefore: Plaintiff prays Judgment be rendered in favor of Plaintiff upon its complaint on file herein and against the defendant and that defendant take nothing by virtue of its counter-claim on file herein.

(Signed) JEROME D. ROLSTON

Attorney for Plaintiff

(Duly Verified.)

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Aug. 11, 1944. [30]

[Title of District Court and Cause.]

DECISION AND ORDER FOR JUDGMENT

The above-entitled cause, heretofore tried, argued and submitted, is now decided as follows:

Judgment is ordered for the defendant on its counter-claim for the sum of \$5320.00, representing the difference between the price paid,—fifty cents per pound—and the value of the rejected candy to the defendant and counter-claimant,—namely, sixty-nine cents per pound.

I am of the view that whether the facts are considered on the basis of the warranty of fitness under the California Code [California Civil Code, Sec. 1735, Subdivision 2] or the express conditions of the purchase order, or whether they be considered as a sale by sample [under Section 1736 of the California Civil Code], the candy rejected was not merchantable and was not up to standard or sample. The evidence is quite clear that the shipment to defendant was [33] part of another and larger shipment by the manufacturer to the plaintiff, that the plaintiff, on the basis of the very deficiencies of which the defendant complained, made complaint to the manufacturer who made a substantial adjustment in the price of the candy. In fact, I am of the view that but for the fact that the plaintiff here felt they were injured by what they called the defendant's waiver, no question would have been raised as to the defendant's claim. It is inconceivable that a wholesaler should receive an adjustment from a manufacturer

and not pass it on to the retailer. It was quite apparent during the trial of the case that the reason this was not done here was because the plaintiff, and especially Mr. Bower, felt that the adjustment was made after payments by the defendant on certain invoices had been allowed to go through. And plaintiff's chief witness (Mr. Bower) felt that the adjustment did not include the candy sent to the defendant, because the invoices for them had been paid. But the evidence of the witness Pocius, the representative of the manufacturer, who came here from Chicago for the purpose, clearly showed that the adjustment was as to the whole shipment including the shipment to the defendant. Mr. Pocius testified that rather than pick up all invoices, some of which had been paid, in order to make an adjustment, they agreed on two flat rates as a basis for adjustment on the invoices which had not been paid. The attitude of the plaintiff was, no doubt, motivated by the thought that the defendant, by continuing to accept candy, after complaint was made and by endeavoring to remedy the wetness of the candy by exposing it to the open air, as suggested by the sales representatives of the manufacturer, had waived the defect and that thereafter, in accepting the candy, they [34] agreed to take it "as is." But there is no legal foundation for such doctrine. On the contrary, the California law states specifically that acceptance shall not bar recovery of damages. [California Civil Code, Sec. 1769] And the plaintiff had ample notice of the defendant's dissatisfaction with the candy.

The defendant's willingness, during the holiday season, to try to remedy the condition, if it could be remedied, is not evidence of waiver of the defects. It is merely evidence of a desire to be fair in the matter. The plaintiff was given ample notice of the condition of the candy. That these conditions were real is evidenced by the testimony of the managers of practically every candy department in the various branches of the defendant's stores. Corroboration of this is given by Mr. Pocius, the representative of the manufacturer, who frankly admitted on the stand that they had manufactured this candy without taking into consideration California's climatic conditions. On the basis of this conviction, he made his adjustment with the plaintiff. Corroboration of this condition of the candy is also contained in the testimony of the sales agents of the manufacturer (Ehrhart and Mitchell) who, when the complaints arose, inspected the candy and saw and reported its condition.

Plaintiff's attempt to show that the manufacturing concern was, in some way, owned or controlled by the defendant was unsuccessful. There is no relation between the two, except, that of manufacturer and supplier, and even as to that, the relationship is not exclusive. Nor does the evidence warrant the intimation that perhaps the candy became wet or moldy because of the manner in which it was kept. The evidence clearly showed that it was kept in unheated, [35] cool warehouses and that the stacks were not piled so high as to account for the condition.

Hence the conclusion that the defendant is entitled to recover and that its right of recovery is not barred either by failure to give proper notice or by waiver of such notice after it was given.

At the same time, I am of the view that, under the provisions of Subsection 6 and 7 of Section 1789 of the California Civil Code, the recovery should be limited to the difference between the price paid and the reduced price of 69 cents, which was adopted after the Christmas holidays. It may well be true that when the sale was made, it was understood that the candy was to be resold at 89 cents and that this price had to be cleared with OPA, on the basis of prior sales in Chicago, and that when such an understanding exists, the difference between the resale price and the price paid represents the value to the buyer. However, the evidence is quite clear that the reduction to 69 cents was unrelated to the quality of the candy. The defendant did not sell any wet or moldy candy.

On the contrary, some of the defendant's managers testified that it is customary to reduce the price of candy after the holidays.

This was more to be expected in the case of a high quality of merchandise, of the type which the defendant did not ordinarily sell in its candy department.

Hence the conclusion that the recovery should be limited to the difference between the price paid and the price at which the candy was being sold when

the defendant finally gave up the attempt to sell it and stored the balance as unmerchantable.

Because of the earnestness of counsel in the presentation [36] of the case, I have stated these grounds of decision. I may add that I have considered all the other matters, legal and factual, raised by the plaintiff at the trial and in its brief, and I find them not well taken.

Formal findings and judgment in conformity with these views will be prepared by counsel for the defendant under local rule No. 7.

Dated this 24th day of February, 1945.

(Signed) LEON R. YANKWICH
Judge

Counsel notified.

[Endorsed]: Filed Feb. 24, 1945. [37]

[Title of District Court and Cause.]

**OBJECTIONS TO PROPOSED FINDINGS OF
FACTS AND CONCLUSIONS OF LAW
AND JUDGMENT**

I.

Plaintiff objects to Paragraph III of the proposed findings and particularly to that portion thereof found on lines 24 to 26 inclusive.

The basis of this objection is that there is no evidence of any expressed warranty in any regard whatsoever disclosed by any of the evidence.

II.

Plaintiff objects to Paragraph IV of said findings and to each and every statement therein contained.

The reasons for this objection are as follows:

(a) Construing the evidence most favorable to the defendant, the evidence still clearly discloses that approximately Two-Thirds (2/3rds) of the candy was merchantable and conformed [38] in quality and condition to the samples, and that, at the most, there was only 9620 pounds that the Court could find was unmerchantable or non-conforming.

(b) That in said finding, beginning on line 8 through 12, the finding is not a finding of fact, but rather a conclusion concerning the words "immediately notified." At this point, the facts should be found from which the Court may conclude that notice was given.

(c) The balance of said paragraph is objectionable as being outside of the issues and was not a fact found by the Court, and is not necessary for the Court's judgment.

III.

Plaintiff objects to Paragraph V of said findings found on pages 3 and 4 for the following reasons:

(a) The testimony clearly showed that defendant was able and did examine all of the candy upon receipt of it, and was further able to determine whether or not the candy was merchantable and in conformance with samples.

(b) There is no evidence that plaintiff requested

defendant to continue to accept further shipments, but to the contrary, the evidence discloses that the manufacturers representatives made the request, if the testimony could be construed as to constitute a request.

(c) The evidence does not support the conclusion found in lines 28 through 30, concerning the continuous advice of the quality of the merchandise.

(d) There is no evidence, at any time, supporting the alleged finding that the defendant advised plaintiff that plaintiff would have to pay defendant's losses for such unmerchantable portions of said candy.

(e) The balance of said paragraph, beginning with line [39] 32 on Page 3 and continuing to the end thereof, is a conclusion and is not properly a finding of fact.

IV.

Plaintiff objects to Paragraph VI of said findings, in that it is entirely immaterial and irrelevant and was not properly admitted into evidence and should not be included in the findings.

V.

Plaintiff objects to Paragraph VII of said findings, and particularly to the second sentence thereof, beginning on line 18 and ending on line 21 of Page 4. The reason for this particular objection is that it is a conclusion and not a finding and that the date of the purported notice is not set forth, and the evidence does not support the alleged request for payment of damage.

Further objecting to the second paragraph of said finding, the whole thereof is a conclusion and is not in accord with the informal Order which was heretofore rendered by the Court.

VI.

Plaintiff objects to Paragraph VIII of said findings, in that it is compound and further does not correctly set forth the stipulation of the parties, which stipulation included interest at the rate of 7% per annum from January 14, 1944. The second sentence of said findings is also a conclusion and is not a finding of fact, and, if construed as a finding of fact, should be separately stated.

VII.

Plaintiff objects to Paragraphs IX, X, XI, XII, XIII and XIV for the reason that they all state what might be a proper conclusion of law, but do not set forth the facts which are to [40] be found to support such conclusion.

VIII.

Plaintiff objects to the Conclusions of Law for the following reasons:

(a) It does not take into account the interest which was stipulated insofar as the plaintiff's case was concerned.

(b) That it is not in conformance with the informal Order and judgment indicated by the Court.

(c) That defendant is not entitled to costs, in that judgment went in favor of the plaintiff.

IX.

Plaintiff objects to the proposed Judgment for each and every reason hereinabove specified as being the basis of the objections to the Conclusions of Law.

Dated this 28th day of March, 1945.

(Signed) JEROME D. ROLSTON

Attorney for Plaintiff

(Acknowledgment of Service.)

[Endorsed]: Filed March 28, 1945. [41]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled cause came on for trial on January 9th, 1945, before the Hon. Leon R. Yankwich, Judge presiding without a jury, a jury trial having been duly and regularly waived by the respective parties, and the plaintiff and defendant Sears, Roebuck and Co. being present in court and being represented by their respective attorneys of record, and evidence, both oral and documentary, having been offered and received, and the Court being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

Jurisdiction in this cause is based upon diversity of citizenship. Plaintiff is and was, at the time

of the commencement of the above-entitled action, a co-partnership doing business in the County of Los Angeles, State of California, and being composed of Earl E. Bower and Walter Hamilton Bower, citizens and residents of the State of California. Defendant, Sears, Roebuck and Co., is and was at the time of the commencement of the above-entitled action, a citizen and resident of the State of New York. The amount in controversy exceeds the sum of \$3,000, exclusive of interest and costs.

II.

Plaintiff is and for some time prior to the commencement of this action, was engaged in the sale of candy and other confections at wholesale in the City and County of Los Angeles.

III.

Defendant is and for some time prior to the commencement of this action, was engaged in the sale of general merchandise, including candy and confections, at retail throughout the United States, including the City and County of Los Angeles. Defendant, on or about October 20th, 1943, purchased by description and by sample from the plaintiff, 28,000 pounds of chocolate pecan fudge candy at 55c a pound to be sold by defendant in its retail business to the knowledge of the plaintiff. Plaintiff expressly warranted that said candy would be of merchantable quality and would be in all respects fit and proper for sale in defendant's retail business. Plaintiff further immediately warranted that such candy would be of merchantable

quality, would conform in quality to the samples shown to defendant, and would be otherwise free from defects rendering said candy unsaleable in defendant's retail business.

At the time of said sale, there did not exist in the County of Los Angeles any established custom or usage in the [44] confectionery trade by which plaintiff warranted that said candy was of merchantable quality and fit for sale by defendant in its retail business.

IV.

The candy delivered to defendant by plaintiff was not of merchantable quality, was not fit for sale in defendant's retail business, and did not conform in quality or condition to the samples submitted to defendant at the time it purchased the candy. Defendant, upon discovery of the unmerchantable quality and condition of said candy and that it did not conform to the quality of the samples, immediately notified the plaintiff that the candy was of unmerchantable quality and condition and did not conform to the samples. At the time defendant purchased said candy and at the time defendant first gave notice to the plaintiff that such candy was of unmerchantable quality and did not conform to the samples, said candy, if it had been as warranted and if it did conform to the samples, had a reasonable value to the defendant of 89c a pound in its retail business.

V.

Delivery of said candy was made to defendant in a number of shipments. Defendant was unable

to examine all of the candy to determine whether all of said shipments of said candy would be of unmerchantable quality and would not conform to the samples. At plaintiff's express request, defendant continued to accept further shipments of candy until the entire 28,000 pounds had been received. Defendant paid the full purchase price of \$15,400 for said candy. Defendant continuously advised plaintiff of the unmerchantable quality of substantial portions of the shipments of candy as such shipments were received and further, advised plaintiff that it would be required to pay defendant's losses for the unmerchantable portions of said candy. Defendant did not at any time [45] expressly or impliedly agree with plaintiff to discharge plaintiff from its liability in damages to defendant for breaches of said warranty. Defendant stored said candy in a careful and proper manner in its retail stores and sold at retail all of said candy that was of merchantable quality.

VI.

Plaintiff purchased said candy sold to defendant from the manufacturer thereof as a part of a larger quantity of said candy. Plaintiff and the manufacturer of said candy agreed upon and plaintiff received a substantial settlement from the manufacturer because of the unmerchantable quality of said entire quantity of candy, including that sold to defendant.

VII.

Of said 28,000 pounds of candy sold to defendant

by plaintiff, 9,620 pounds were of unmerchantable quality, did not conform in quality to the samples, and were unfit for sale in defendant's retail business. Defendant notified plaintiff that said 9,620 pounds of candy were unmerchantable and unfit for sale in defendant's retail business and requested plaintiff to pay for the damage suffered by defendant by reason of the breaches of said warranties. At the time defendant notified plaintiff that said 9,620 pounds of candy were unmerchantable, said candy, if it had been as warranted had a reasonable value to defendant in its retail business of 69c a pound.

Defendant, having paid in full for said candy, was damaged by breach of said warranties in the sum of 69c a pound for each of said 9,620 pounds, or in the total sum of \$6,637.80.

VIII.

Plaintiff sold to defendant other merchandise of a reasonable value of \$7,738.99. Defendant has held said sum as an offset [46] to the liability of plaintiff to defendant for the breach of warranties, as aforesaid. Defendant is entitled to offset against said sum of \$7,738.99 its damage in the sum of \$6,637.80.

IX.

Defendant is not barred from asserting its claims for damage for breaches of said warranties by its laches.

X.

Defendant did not waive its claims for damage

for breaches of said warranties by its acts or conduct at any time or in any manner.

XI.

Defendant did not estop itself from asserting its claims for damage for breaches of said warranties by its acts or conduct at any time or in any manner.

XII.

Except as herein elsewhere expressly found to the contrary, all of the allegations of defendant's first, second, third and fourth separate and distinct causes of counterclaim are true.

XIII.

Except as herein elsewhere expressly found to the contrary, all of the allegations of plaintiff's complaint are untrue.

XIV.

Except as herein elsewhere expressly found to the contrary, all of the allegations of plaintiff's reply to the counterclaim are untrue. [47]

CONCLUSIONS OF LAW

Plaintiff is entitled to a judgment in the sum of \$1,101.19, and defendant is entitled to its costs incurred in said action.

Dated April 2, 1945.

(Signed) LEON R. YANKWICH,

Judge of the District Court.

(Acknowledgment of Service.)

[Endorsed]: Filed April 2, 1945. [48]

In the District Court of the United States, Southern District of California, Central Division.

No. 3676-Y Civil

BOWER-GIEBEL WHOLESALE CO., a copartnership composed of EARL E. BOWER and WALTER HAMILTON BOWER,
Plaintiff,

vs.

SEARS, ROEBUCK AND CO., a corporation,
DOE ONE and DOE TWO,
Defendants.

JUDGMENT

The above-entitled cause came on regularly for trial on January 9th, 1945, before the Hon. Leon R. Yankwich, Judge presiding without a jury, jury trial having been duly and regularly waived by the respective parties, and the plaintiff and defendant, Sears, Roebuck and Co. being present in court and being represented by their respective attorneys of record, and evidence, both oral and documentary, having been offered and received, and the Court being fully advised in the premises,

Now, Therefore, It Is Ordered, Adjudged and Decreed, that said causes of action as to Doe One and Doe Two be dismissed; that the plaintiff Bower-Giebel Wholesale Co., a copartnership composed of Earl E. Bower and Walter Hamilton Bower, have and recover the [50] sum of \$1,101.19 from the defendant, Sears, Roebuck and Co., a

corporation; and that defendant, Sears, Roebuck and Co., a corporation, have and recover judgment against the plaintiff for its costs of suit in the sum of \$83.05.

Dated: April 2, 1945.

LEON R. YANKWICH,

Judge of the District Court.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 2, 1945. [51]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the plaintiff, Bower-Giebel Wholesale Company, a co-partnership, and makes this its motion for a new trial upon the following rounds:

(1) That inadequate damages were allowed to the plaintiff appearing to have been given under the influence of prejudice or passion;

(2) That the evidence was insufficient to justify the decision and judgment in the following specifications:

(a) The judgment should be for the plaintiff in the sum of \$7,738.99, together with interest at the rate of 7% per annum from January 14, 1944, against which the Court apparently has allowed a set-off in the sum of \$6,637.80;

(b) The evidence is insufficient to support the

finding and conclusion that [53] notice of any alleged defect was given to the plaintiff with sufficient timeliness and clarity as required by the laws of the State of California and of the United States Court;

(c) That the evidence is insufficient in failing to disclose any cause for the alleged defectiveness of the merchandise involved;

(d) That the evidence is insufficient to support the damages allowed on the counter-claim in that the defendant failed to set forth all of the elements of said alleged damage.

(3) Errors in law occurring at and during the trial, to-wit:

(a) All evidence of other adjustments of candy other than that delivered to the defendant was not properly admitted as in being proof of whether or not candy delivered to the defendant was defective or to prove any other issue before the Court;

(b) The evidence clearly shows that the defendant, by their conduct, statements and actions, were estopped from claiming any breach of warranty.

(c) That the Court did not properly apply the measure of damages and loss of profits;

(d) That the Court erred in finding that there was any express warranty;

(e) That the Court erred in finding [54] that

defendant notified plaintiff of any breach of warranty;

(f) That the Court erred in finding that there was any express request by plaintiff for deferment to continue to receive further shipments;

(g) That the Court erred in finding that plaintiff would be required to pay defendants' losses for the unmerchantable portion of the product delivered;

(h) That the Court erred in making any finding whatsoever with regard to any adjustments made between plaintiff and the manufacturer involving candy other than that delivered to the defendant.

This motion shall be heard upon the pleadings and all papers on file and upon the minutes of the Court, and upon all exhibits introduced during the trial of said cause, and upon all evidence introduced during the trial of the above-entitled cause.

Dated this 10th day of April, 1945.

(Signed) JEROME D. ROLSTON,

Attorney for Plaintiff.

(Affidavit of Service by mail attached.)

[Endorsed]: Filed April 11, 1945. [55]

At a stated term, to-wit: The September Term, A. D. 1945, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 10th day of September in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable: Leon R. Yankwich,
District Judge.

[Title of Cause.]

This cause coming on for hearing motion of plaintiff for a new trial, and there being no appearances at 10 A. M. it is ordered that the cause be, and it hereby is, continued to 2 P. M. for the said proceedings.

At 2 P. M. court reconvenes in this case, Jerome D. Rolston, Esq., appearing as counsel for the plaintiff; John L. Wheeler, Esq., appearing as counsel for the defendant; Attorney Rolston argues in support and Attorney Wheeler argues in opposition. It is ordered that the motion is denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Sears, Roebuck and Co., Defendants Herein,
and to John L. Wheeler, Their Attorney, and
to Edmund L. Smith, Clerk of the Above
Entitled Court:

You, and Each of You, Will Please Take Notice,

that plaintiff herein, Bower-Giebel Wholesale Company, a co-partnership composed of Earl E. Bower and Walter Hamilton Bower, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the second day of April, 1945, and from the Order of the above entitled Court denying plaintiff's Motion for New Trial which Order is entered on the tenth day of September, 1945.

Dated this 8th day of December, 1945.

JEROME D. ROLSTON,
Attorney for Plaintiff.

[Endorsed]: Filed Dec. 8, 1945. [58]

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL

It Is Hereby Stipulated By and Between the Parties Hereto, by and through their respective counsel that the following documents may be docketed with the Circuit Court of Appeals for the Ninth Circuit in connection with the plaintiff's appeal in the above entitled matter:

1. Plaintiff's Complaint.
2. Defendants' Answer and Counter Claim.
3. Plaintiff's reply to Counter Claim.
4. Decision and Order for Judgment.
5. Findings of Fact and Conclusions of Law.
6. Objections to Proposed Findings of Fact and Conclusions of Law.

7. Judgment.
8. Motion for New Trial. [59]
9. Notice of Appeal.

10. Typewritten transcript of all of the testimony during the course of trial.

It Is Further Stipulated that all Exhibits introduced by either party during the course of trial may be submitted to the Appeal Court in their original form.

It Is Further Stipulated that no Appeal Bond need be filed by the appellant.

Dated this 12th day of January, 1946.

(Signed) JOHN L. WHEELER,
Attorney for Defendant.

(Signed) JEROME D. ROLSTON,
Attorney for Plaintiff and
Appellant.

It is so ordered.

Dated: January 14, 1946.

LEON R. YANKWICH,
Judge.

[Endorsed]: Filed Jan. 14, 1946. [60]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing

pages numbered from 1 to 60 inclusive contain full, true and correct copies of Complaint; Petition for Removal; Bond on Removal; Minute Orders of the Superior Court dated May 11, 1944 and May 15, 1944 respectively Order of Removal to United States District Court; Certificate of Clerk of the Superior Court to Removal Papers; Answer to Complaint and Counter-Claim; Reply to Counter-Claim; Decision and Order for Judgment; Objections to Proposed Findings of Fact, Conclusions of Law and Judgment Findings of Fact and Conclusions of Law; Judgment; Motion for New Trial; Minute Order Entered September 10, 1945 Notice of Appeal and Stipulation re Record on Appeal which, together with copy of Reporter's Transcript and Original Exhibits, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$16.45 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 16th day of January, 1946.

[Seal] EDMUND L. SMITH,
Clerk

THEODORE HOCKE
Chief Deputy Clerk.

In the District Court of the United States for the
Southern District of California, Central Di-
vision.

Hon. Leon R. Yankwich, Judge Presiding.

No. 3676-Y.

BOWER-GIEBEL WHOLESALE COMPANY,
Plaintiff,

vs.

SEARS, ROEBUCK AND COMPANY,
Defendant.

REPORTER'S TRANSCRIPT OF TESTI-
MONY AND PROCEEDINGS ON TRIAL

Appearances: Jerome D. Rolston, Esq., for the
Plaintiff. John L. Wheeler, Esq., for the Defendant.

Los Angeles, California,
Tues, January 9, 1945, 10 A.M.

Mr. Wheeler: We are ready to stipulate to plain-
tiff's case in chief, and go ahead on the counter-
claim, with one exception there is no stipulation of
the account stated.

The Court: You have two causes of action, first
for money, claiming the sale of merchandise,
\$7738.99, and a claim for interest from January 14,
1944. The second cause of action is account stated.

Mr. Wheeler: Open book account. The third is
account stated.

Mr. Rolston: The third may be abandoned; and
the second stipulation as to proof, that that is the

correct balance between the parties. The only question is as to the supposed warranties under the counter-claim. Is that right, Mr. Wheeler?

Mr. Wheeler: That is correct.

Mr. Rolston: Before we proceed, we have several documents we may want to refer to, so far as the open book account, being pages of the ledger, as well as copies of invoices, and we ask that they be marked for identification, so the foundation will be there. This is a group of six pages of the ledger account.

The Clerk: Plaintiff's 1 for identification.

Mr. Rolston: And 18 copies of invoices as Plaintiff's—— [2*]

The Clerk: Plaintiff's 2 in evidence.

RALPH PARKER ASHBY,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Your name, sir?

The Witness: Ralph Parker Ashby.

Direct Examination

Q. Mr. Ashby, you are a resident of Los Angeles?
A. Lynwood.

Q. How long have you resided in Los Angeles County?
A. 24 years.

Q. What is your present employment?

A. Buyer for Sears, Roebuck and Company.

Q. How long have you been so employed?

* Page numbering appearing at top of page of original Reporter's Transcript.

Testimony of Ralph Parker Ashby.)

A. Five years.

Q. Did you have any prior employment with Sears, Roebuck and Company, before you became a buyer? A. I did not.

Q. In what department or division are you a buyer?

A. I am a buyer of food and drug products.

Q. During the period from October, 1943, through March of 1944, what was your function?

A. At that particular time I was buyer of candy products almost entirely.

Q. For any particular division of the company?

A. The Los Angeles group of retail stores.

Q. Calling your attention to a transaction involving Pan O'Butter Fudge, Mr. Ashby, I will ask you with whom you first discussed this matter.

A. Do you mean in reference to the Bower-Giebel Company?

Q. With anyone.

A. The first discussion of the fudge was over the phone with Mr. Bower.

Q. When was that conversation?

A. To the best of my knowledge it was October 21st.

Q. What year? A. 1943.

Q. Did you know Mr. Bower?

A. Yes, we had considerable dealings before this time.

Q. With reference to the purchase of candy?

A. With reference to the purchase of candy items, yes.

Testimony of Ralph Parker Ashby.)

Q. What was the telephone conversation between you and Mr. Bower at that time?

A. Mr. Bower called me and stated he had two gentlemen in his office who had quite a large quantity of fudge for sale, [4] and wanted to know if I would be interested. I said I would be. He wanted to know whether I could come down. I said I would be down within the next hour or so.

Q. Was there any further conversation that you recall?

A. Over the phone?

Q. Yes.

A. No.

Q. Did you go to his office?

A. I went to his office, yes.

Q. Whom did you meet there in his office?

A. I was introduced to two gentlemen by Mr. Bower, by the name of Erhardt and Mitchell.

Q. Do you recall Mr. Erhardt's first name?

A. It did not come up until later, but later I learned it was Alphonse.

Q. Did you learn Mr. Mitchell's first name?

A. I later learned, in the course of conversation, he was called Bob. I assume that is his name.

Q. Were there any other persons present at the time of this meeting?

A. Well, various people in the office, but not directly engaged in business matters under discussion.

Q. Will you relate the conversation that took place at that time with reference to Pan O' Butter Fudge?

A. As I recall it, Mr. Bower showed me a sam-

Testimony of Ralph Parker Ashby.)

ple of what [5] purported to be Pan O' Butter Fudge. He stated this was fudge these gentlemen had for sale, and it looked pretty good to him, and what did I think of it? By the appearance of it, it looked pretty good to me. I said, "Approximately what would it cost?" And he said around 60c a pound. Then I asked him what was in the fudge, and while Mr. Bower himself did not answer that directly, the other gentlemen who were selling the merchandise explained what was in it. They showed me the label on the fudge, which backed up their claim that it contained real butter, top quality pecan nuts, and the proper amount of sugar and seasoning, and various other ingredients that go into fudge. Judging from that, and, as I say, that it looked——

Mr. Rolston: I objected to any voluntary statements not part of the conversation.

The Court: He is relating the conversation. What did you do? Don't give us your thought; just say what was said.

A. After what the gentlemen pointed out as the ingredients of the fudge, and it was on their label backing up what they said, and the appearance of the fudge was good, I then brought up the matter of price. Mr. Bower and I went back and forth on that, finally agreed it would be a 55c price, which would be the price we would pay. Then he came to discussion of the quantity. We discussed various [6] amounts, and finally we came out for the purchase by Sears, Roebuck and Company to be 28,000

(Testimony of Ralph Parker Ashby.)

pounds, which was, roughly, half a carload. Having done a lot of business with Mr. Bower, I felt, as long as I was buying it through him——

Mr. Rolston: One minute——

The Court: No.

A. After the discussion of the price I then wrote out a purchase order, and at the same time we wrote the purchase order we talked about them getting an OPA approval on this price. They said they would get this, so I gave them the purchase order, which specified the date the transaction took place, which was October 21st, and the delivery date, which the purchase order will show, was November 6th. We shook hands, and I went back to my office.

Q. By Mr. Wheeler: Mr. Ashby, with reference to this fudge that was there, what was its size.

A. Size?

Q. Yes; what was the size or quantity of fudge?

A. There was a slab. I don't know whether that was the exact weight, but I would say in the neighborhood of 10 pounds. I did not pick it up.

Q. What was its appearance?

A. The appearance was very fine.

Q. Did you make an examination of the fudge?

A. Yes, a portion of the fudge was cut off. I took that [7] sample back to my office.

Q. What did you observe during the cutting of the fudge?

A. We observed, during the cutting of the fudge, that it cut clean, which meant——when buying fudge,

Testimony of Ralph Parker Ashby.)

if the fudge cuts clean, and does not stick to the knife, that means the fudge has been cooked to a sufficient temperature; inasmuch as the cutting showed this was clean, it proved to me that the fudge was cooked to the proper consistency, and therefore was edible.

Q. Did you eat any of the fudge at that time?

A. No; I don't eat candy.

The Court: You just buy it for the other fellow?

A. That's right; I have sugar diabetes.

The Court: Don't apologize. I don't eat candy either. I don't like it.

Q. By Mr. Wheeler: You say you took a sample? A. That's right.

Q. What did you do with the sample, Mr. Ashby?

A. When we took the sample back to the office—we have a cabinet in the office where we keep all of these candy samples, food products samples, and so forth. I merely put it in with the other samples we had in the cabinet.

Q. Did you at any subsequent time examine that sample?

A. Yes. Our normal practice is, between Christmas [8] and New Years——

Mr. Rolston: I am going to object to any normal practice.

A. Our practice, between Christmas and New Years, is to clean out——

Testimony of Ralph Parker Ashby.)

Mr. Rolston: I am still objecting to any practice of any kind.

The Court: Don't tell us your practice. Tell us what you did.

A. Each New Years we always clean out the sample cabinet. I cleaned out the sample cabinet.

The Court: Go ahead.

A. That is a misstatement. I had my secretary do it, and she threw the sample out, along with all the other samples of food products that we had in the cabinet.

Q. By Mr. Wheeler: Did you examine the sample at that time?

A. Yes, at that time I looked over that sample, plus others that were in there.

Q. What did you observe with reference to that sample at that time?

A. The sample of the fudge, while hard outside, was very good on the inside.

Q. What did you observe with reference to mold, if anything? [9]

A. There was no mold.

Q. What did you observe with reference to color, Mr. Ashby?

Mr. Rolston: I am going to object to the leading form of questions.

The Court: This man is experienced, Mr. Rolston. He can give a description of what he saw without splitting it up. Describe the condition in which you found the fudge, so far as edibility, and any other things, in relation to the fudge.

Testimony of Ralph Parker Ashby.)

A. The fudge, being exposed to the air, was naturally hard on the outside. Breaking it open, it was still moist on the inside, but there was no indication of mold in the sample.

Mr. Wheeler: I will show you——

The Clerk: Defendant's Exhibit A.

Q. By Mr. Wheeler: I will show you what purports to be a purchase order on a paper or form entitled "Sears, Roebuck and Co.", being No. R407215, and ask you if that is the purchase order which you prepared at the time in Mr. Bower's office?

A. This is the purchase order, with the purchase price, although the ink writing on there is not my writing.

Mr. Rolston: So stipulated; that ink portion was after Mr. Rolston gave the purchase order.

Mr. Wheeler: I offer that in evidence.

The Court: It may be received as cross-complainant's exhibit.

The Clerk: Exhibit A.

Q. By Mr. Wheeler: I call to your attention the date in the lefthand corner, Mr. Ashby, and I will ask you if the order was prepared on the date that the order bears? A. Yes.

Q. That date is——

A. This order was written down in the office. At the time the merchandise was bought the order was handed to Mr. Bower.

Q. That date is October 20, 1943?

A. Yes, apparently it is.

Testimony of Ralph Parker Ashby.)

Q. Mr. Ashby, during your relation of the conversation that you had on October 20th, you stated that you agreed upon a price of 55c. Was that per pound?

A. That was the price per pound, yes.

Q. Did you have any discussion, during that conversation, with reference to the pecans or nuts in the fudge? A. Yes.

Q. Will you state the conversation?

A. We merely asked that a few more pecans be put on top of the fudge, and a few more be ground up and scattered through it, to make it a little richer in nut content. [11]

Q. Did you have any discussion with reference to the delivery of the fudge?

Mr. Rolston: I am going to object to this form of question as leading and suggestive as to a conversation already related.

The Court: I don't think the question of the time of shipment has been gone into at all. There is no harm. The answer is either yes or no. Objection overruled. A. Yes.

Q. By Mr. Wheeler: What was the conversation you had with Mr. Bower with reference to the delivery, on October 20th?

A. I do not recall the exact words. I can give you the essence, if that is satisfactory.

Q. If you will state what your recollection is.

A. The essence of the conversation was that the merchandise had to be delivered before Christmas.

Q. Was there any further conversation with reference to delivery?

Testimony of Ralph Parker Ashby.)

A. No, not while I was there.

Q. Referring to the Pan O'Butter Fudge, when did you have the next discussion, or next conversation, with Mr. Bower concerning it?

A. Before answering that I would like to qualify it, if I may. [12]

The Court: All right.

A. I don't recall the exact date of the next conversation, because there was none, generally speaking, in reference to the fudge, other than the OPA price of the fudge.

Q. You did have some conversation, then, with Mr. Bower with reference to the OPA pricing of the fudge? A. That's right.

Mr. Wheeler: At this time I offer in evidence a letter dated November 13, 1943, on the stationery of the Karmel Korn Commissary, signed by O. Pocius, addressed to E. W. Bower.

Q. Mr. Ashby, I will ask you to examine the letter. Did you receive that letter?

A. This letter was given to me by Mr. Bower.

Q. Do you recall the date on which you received it? A. I don't recall the exact date.

Q. Do you recall the date with reference to the date that it bears? A. I don't understand.

Q. Can you recall whether it was prior to November 13th, or subsequent to November 13th?

A. This letter I see is dated November 13th. It was addressed to Mr. Bower; not to me. Mr. Bower handed it to me. I would say it was some time after November 13th.

Testimony of Ralph Parker Ashby.)

Mr. Wheeler: At this time I offer it in evidence.

The Clerk: Defendant's Exhibit B. [13]

The Court: It may be received as Defendant's Exhibit B.

Q. By Mr. Wheeler: Calling your attention to this letter, Mr. Ashby, I will ask you if the conversations which you had with Mr. Bower concerning the OPA pricing occurred prior to your receipt of the letter. A. Yes.

Q. What was the conversation that you had with him?

A. I said to Mr. Bower that the local OPA people were requiring some form of a letter from the manufacturer of the merchandise stating that it complied with OPA regulations, and I could not take delivery on the merchandise until I received this letter.

Q. Did you have any further conversations with Mr. Bower concerning the OPA regulation, after you received this letter?

A. Other than I explained. This letter complied with the regulations.

Q. After the receipt of the letter did you have any further conversation with Mr. Bower concerning Pan O' Butter Fudge? A. Yes.

Q. When was the next conversation that you had with him?

A. The next conversation in which the subject of Pan O' Butter Fudge came up was on or about November 25th. It could have been a day either way. [14]

Testimony of Ralph Parker Ashby.)

Q. Do you recall anything that occurred on the day that you had this conversation with Mr. Bower?

A. On this day I took down a sample of this Pan O' Butter Fudge to Mr. Bower's office and showed him the type of goods that was arriving against this order.

Q. You went to his office? A. Yes.

Q. What was the condition of fudge that you took to his office?

A. The condition of the fudge that I took was extremely moist, wet.

Q. What was its appearance?

A. Well, we——

Q. What was the conversation that you had with Mr. Bower at that time?

A. I said to Mr. Bower, "This is the type of merchandise we are getting", and something would have to be done about it.

Q. Was there any further discussion with reference to Pan O' Butter Fudge?

A. Mr. Bower agreed with me and said he would get hold of the representatives of the manufacturer to see what could be done.

Q. Did you have any further conversation with him at that time? [15]

A. There might have been further, but that is all I recall, unless you have something to refresh my memory.

Q. Did anyone call on you? A. Yes.

Q. And on what date was that call made?

A. Monday, November 29th.

Testimony of Ralph Parker Ashby.)

Q. Who called on you?

A. A Mr. Erhardt, the gentleman I had previously met in Mr. Bower's office.

Q. Where did you meet Mr. Erhardt?

A. In my office.

Q. What occurred in your office?

Mr. Rolston: To which I am going to object as immaterial; what occurred in the office in the absence of the other party would be hearsay.

Q. By Mr. Wheeler: What occurred would not be hearsay. I will reframe the question: Did you show Mr. Erhardt the candy, or any candy?

A. Yes.

Q. On the occasion of his visit? A. Yes.

Q. Where did you first show him the candy?

A. We had approximately 90 pounds in my office, which I showed him first.

Q. What was the condition of that fudge? [16]

A. This fudge was very soft. It would run together, and was beginning to mold.

Q. Did you show Mr. Erhardt any other fudge?

A. Yes.

Q. Where did you show him that fudge?

A. I took Mr. Erhardt to the stock room of the Boyle Street store, which was in the same building.

Q. Where was that stock room situated?

A. On the second floor of the building, located at 2650 East Olympic Boulevard, Los Angeles.

Q. Where was it, with reference to your office?

A. I would say approximately 100 yards away from my office in the center of the building. My

Testimony of Ralph Parker Ashby.)

office has windows, and the stock room is right in the center of the building.

The Court: It does not face the street?

A. No; directly in the center of the building. It has no outside windows at all.

Q. By Mr. Wheeler: It is a part of the warehouse space in the building?

A. That's right.

Q. Your offices are located in the office space of the building? A. That's right.

Q. What fudge did you show Mr. Erhardt at that time? [17]

A. The fudge that was in the cases was stacked up there. I merely asked Mr. Erhardt to pull out any case he wanted to. He selected four or five cases, and we opened those.

Q. What was the condition of the fudge?

A. The fudge in those cases was very wet, moist, and was beginning to run, and in some cases was starting to mold around the nuts.

Q. Did you have any conversation with Mr. Erhardt? A. Yes.

Q. What conversation did you have with him?

Mr. Rolston: To which I am going to object. Any conversation this witness had with Mr. Erhardt would be hearsay so far as the Bower-Giebel Wholesale Company is concerned.

Mr. Wheeler: If your Honor please, I think the testimony shows that this man was sent over.

The Court: He was directed to go over.

Testimony of Ralph Parker Ashby.)

Mr. Wheeler: He was directed to go over to see him.

Mr. Rolston: There is no showing he was a representative of ours.

The Court: But he acted as agent in the sale. You are responsible for what you sell.

Mr. Rolston: Responsible for what we sell; not responsible for what any person may say. [18]

The Court: If a man makes a complaint, and you send a man as a representative, he becomes your agent for the purpose of the conversation.

Mr. Rolston: I still object as hearsay. Anything said would be immaterial so far as we are concerned. He did not represent us.

The Court: He was sent there to get the complaint.

Mr. Rolston: He was sent as a representative of the factory. That was shown in Mr. Ashby's conversation.

The Court: Anyhow, he was sent to see Ashby. Sears, Roebuck and Company have no contractual relation with the factory.

Mr. Rolston: That is right.

The Court: The objection will be overruled.

Q. By Mr. Wheeler: What conversation did you have with Mr. Erhardt at that time?

A. I pointed out the condition of the fudge which Mr. Erhardt had himself selected from the sealed cases. Mr. Erhardt was very much concerned, and said that he would give me 90 pounds

Testimony of Ralph Parker Ashby.)
to replace the 90 pounds that was in my office which,
from his own examination, was not salable.

Mr. Rolston: One moment. I am going to object to that as the conclusion of this witness.

The Court: That may be stricken. Did he promise to give you 90 pounds? [19]

A. If I may break in there, I gave him an order for it, binding the promise.

Mr. Wheeler: We will come to that; but just relate the conversation that you had with Mr. Erhardt at that time.

A. Erhardt was going to give me——

The Court: Tell what was said.

A. Mr. Erhardt said, "I will give you 90 pounds of fudge to replace the fudge that you have there in your office, which I can see is unsalable." Mr. Erhardt suggested that we open up the cases of fudge to let them air and dry out before taking it down to the sales store. I stated that I would do this, but I still could not tell, unless we had gone through all the cases, the amount of the fudge that was unsalable; therefore I would go along with the 90 pounds' adjustment until we were able to check all the cases, and find out exactly how much was unsalable.

Q. Did you have any further conversation with Mr. Erhardt at that time? A. No.

Q. Showing you what appears to be an order on the form of Sears, Roebuck and Co., No. R12736, addressed to Karmel Korn Commissary, and I will

Testimony of Ralph Parker Ashby.)

ask you if that is the order which you gave to Mr. Erhardt at that time?

Mr. Rolston: To which I am going to object. Any questions regarding the documents addressed to Karmelkorn [20] Kommissary have no bearing on the relationship in this matter.

The Court: May I look at it? Objection overruled.

Mr. Wheeler: I ask that that be marked Defendant's Exhibit C.

The Court: It may be received.

The Clerk: So marked.

Q. By Mr. Wheeler: This order was prepared by you, and is signed by you? A. It was.

Q. And I call your attention to the date of the order, 11/29/43. The order was made out on the date that it bears? A. That is right.

Q. With reference to the Pan O' Butter Fudge, Mr. Ashby, did you have any conversations with Mr. Bower after Mr. Erhardt left your place of business? A. That same day?

Q. At any time? A. Yes, later.

Q. Do you recall the date of that conversation?

A. To the best of my recollection the date was December 2nd.

Q. How did the conversation occur, in person, or by telephone? [21] A. By telephone.

Q. Will you relate the conversation that you had with Mr. Bower at that time?

A. I do not recall whether Mr. Bower called me, or I called him. I do know the conversation was

Testimony of Ralph Parker Ashby.)

by phone. As our conversation started, Mr. Bower asked me if Mr. Erhardt had been over to see me. I said yes. Mr. Bower then asked me what arrangement we had come to. I repeated to Mr. Bower what Mr. Erhardt had said; that is, that he would give me 90 pounds of fudge to replace the 90 pounds that he saw in my office that was unsalable. I pointed out to Mr. Bower that I was still unsatisfied, but I did not want to be tough about the matter, and we would follow Mr. Erhardt's suggestion that we open the cases, and let the fudge dry out, and check the stores and find out just how much fudge was in an unsalable condition. I then told Mr. Bower that we would let him know the amount that was unsalable, and he said that was fine; and just a few other words relating to business in general, and we hung up.

Q. Did you call the various stores to which this candy had been delivered, for the purpose of advising them to take the covers off the fudge?

A. I called some stores, and I had my secretary call some of the others.

Q. When was the next conversation that you had with Mr. [22] Bower, that you recall, with reference to Pan O' Butter Fudge?

A. I don't recall the exact date. If I may explain, your Honor.

The Court: Yes.

A. Mr. Bower and I were having business dealings; I would see him once or twice, occasionally three times a week, all the time this fudge deal

Testimony of Ralph Parker Ashby.)

was going on. Therefore, I can't be specific about some of the dates.

Q. You are doing pretty well.

A. The next time I specifically recall—there again, I cannot give you the exact date, but I do know it was in the week previous to Christmas.

Q. By Mr. Wheeler: Where did this conversation occur?

A. It occurred in Mr. Bower's place of business.

Q. What was said with reference to Pan O' Butter Fudge at that time?

A. Very little was said other than the fact that Mr. Bower asked me how the fudge was going. I said we were still having trouble, but we were selling some part of it.

Q. Did you have any further conversation with Mr. Bower prior to Christmas?

A. Only as I just mentioned to his Honor; there might have been some conversations in there, but I couldn't recall [23] any exact date.

Q. When was the next conversation that you had with Mr. Bower?

A. The next conversation covering the fudge was on January 4, 1944.

Q. Where did that conversation occur?

A. That occurred in Mr. Bower's office.

Q. What was the occasion for your visit at that time?

A. I took down a 9-pound sample of fudge to give Mr. Bower visible evidence that the fudge was not coming through, or, rather, had not come

Testimony of Ralph Parker Ashby.)

through at that time, as specified, and I wanted something done about it.

Q. What was the condition of the 9-pound slab of candy that you took to Mr. Bower at that time?

A. This particular slab was very hard.

Q. Did it have any other characteristic that you observed?

A. It was discolored.

Q. When you say discolored, describe the discoloration.

A. The normal fudge is a rich chocolate color. This particular piece was very light, or mud color, or tan.

Q. When you say it was very hard, what test did you make with reference to its hardness?

A. I dropped the fudge on the concrete floor, and it didn't break. [24]

The Court: That was hard. Did you have one of these hammers they have in the candy shop?

A. They took all of those for the WPB.

The Court: You can see I am not a candy buyer or candy eater. I thought they still had those hammers.

A. Not for a number of years.

Q. By Mr. Wheeler: Did you have any conversation with reference to this fudge at that time?

A. I pointed out the condition of the fudge, and Mr. Bower agreed with me that it was pretty bad, and he would get hold—

Mr. Rolston: I move to strike out any statement as to any grievance.

The Court: Just what was said.

Testimony of Ralph Parker Ashby.)

A. He said, "I will get hold of Bob Mitchell, the representative of Karmelkorn Kommissary."

Q. So that the record is clear, Mr. Ashby, your statement with reference to Mr. Bower saying that he agreed that it was pretty bad, as I undertsand the record, that has been stricken. Did Mr. Bower make any comment as to the character or the condition of the candy?

A. Yes, he said, "It looks very bad."

Q. Did you have any further conversation with Mr. Bower? A. Yes. Mr. Bower— [25]

Mr. Rolston: When?

Q. By Mr. Wheeler: When was the next conversation?

A. Right the same day. A part of this.

Q. This was part of the same conversation?

A. Yes. Mr. Bower talked to someone on the phone, which I gathered was Mr. Mitchell from hearing my end of the conversation, and an appointment was made for representatives of this Karmelkorn Kommissary concern and Mr. Bower to see me, either the 6th or 7th of January, to actually inspect the fudge again. [26]

Q. Did Mr. Mitchell or Mr. Bower visit you and inspect the fudge on January 6th or 7th?

A. They did not.

Q. Did you have any conversation with Mr. Bower on January 6th or 7th?

A. I called his office on January 6th, but I was not able to get him. On January 7th I talked with him. He said that he had not, or rather Bob

Testimony of Ralph Parker Ashby.)

Mitchell had not as yet shown up, so he could not come over.

Q. Did you have any further conversation with Mr. Bower concerning the Pan O' Butter Fudge?

A. The next conversation with Mr. Bower concerning the fudge was some time in the week following January 12th. I believe it was the 16th or thereabouts.

Q. Did Mr. Mitchell visit you at your place of business?

A. They did,—or rather he did.

Q. Was there anyone else?

A. He was accompanied by Mr. Erhardt.

Q. Did you show Mr. Mitchell and Mr. Erhardt the fudge, or any of the fudge, at the time of their visit? A. I did.

Q. Do you recall the date of their visit?

A. January 12th.

Q. Where did you show them any part of the fudge?

A. I showed it in the Boyle store stockroom.

Q. Tell what happened there.

A. Mr. Erhardt and Mr. Mitchell came to my office first, and then we went over to the stock room, and at that time we had some of the fudge open and lying out, as Mr. Erhardt had previously suggested that we do. When they looked at it they were naturally very much amazed at the condition of the fudge.

The Court: No.

Testimony of Ralph Parker Ashby.)

A. When they looked at it, they made some specific comments.

The Court: That is better.

Q. By Mr. Wheeler: What did they say, as nearly as you can recall?

A. There again I am just repeating what I heard one or the other of the gentlemen state: If they hadn't seen it with their own eyes they would not believe it was possible. One or the other stated: Generally speaking, I would argue with the buyer. This time the buyer is absolutely right.

Q. What was the condition of the fudge at that time?

A. At this time the condition of the fudge was very moldy. It was, in fact, virtually running out of the cases. That is, it had become so soft it was virtually running out of the cases, and very moldy around the nuts.

Q. How many cases did they examine at that time? [28]

A. I don't recall the exact amount. It was somewhere in the neighborhood of eight or ten.

Q. Eight or ten cases? A. That is right.

Q. There were a number of cases in the store-room at that time? A. Yes.

Q. They did not examine all of the cases?

A. No, they didn't.

Q. Did you have any further conversation with Mr. Erhardt and Mr. Mitchell at that time?

A. I did.

Q. What was the conversation?

Testimony of Ralph Parker Ashby.)

A. I do not recall the exact words.

Mr. Rolston: May it be understood I am objecting to all conversations between this witness and the representatives of Karmelkorn, Erhardt and Mitchell, in which we were not present.

The Court: Overruled. You may answer.

A. I stated to Mr. Erhardt and Mr. Mitchell, as I was addressing both of them as they stood in front of me, that I was not concerned about what their trouble would be with Mr. Bower or the Karmelkorn; that my beef was with Mr. Bower. All I wanted was to find out what they were going to do; to let me give them the quantities that were unsalable, so we could pay [29] the bill and wind the matter up.

Q. By Mr. Wheeler: Did you have any further conversation with them at that time?

A. No. If I may qualify that, the conversation just consisted of the usual goodbye, and they said they would get in touch with Mr. Bower.

Q. Did you have any conversation, after their visit, with Mr. Mr. Bower? A. I did.

Q. When was that conversation?

A. I don't recall the exact date of it. There were three days in a row we had conversations. My memory of the date is that they were the 16th, 17th and 18th of January.

Q. As to the first of the conversations that you had, was it by telephone, or in person?

A. Telephone.

Q. What was said during that conversation?

Testimony of Ralph Parker Ashby.)

A. I again asked Mr. Bower what he was going to do about the fudge. He said, so far as he was concerned, he was not going to do anything; that we had not notified them in time and, anyway, Karmelkorn was part of Sears, Roebuck and Company, and why didn't we get it straightened out amongst ourselves; that he was not concerned.

Q. Did you have any further conversation with him? A. On the 17th. [30]

Q. Was that in person, or by telephone?

A. Telephone.

Q. What was said during the conversation?

A. I asked Mr. Bower again if he was going to come over, and let us sit down and get this matter straightened out. He said he was too busy to come over.

Q. Did you have any further conversation with him at that time?

A. I called him again the next day and asked him if he was going to come over, and let us get it straightened out; that I wanted to get it off my mind because we were getting toward inventory time, and I wanted it cleaned up; he still said he was too busy to come over.

Q. Did you have any further conversation with him?

A. I had no further conversation with him.

(Short recess.)

Mr. Wheeler: If your Honor please, I don't like to interrupt the testimony of Mr. Ashby, but there is a young lady here who is a division man-

ager in one of the stores. She has to go to Palm Springs for her employment, and I would like to put her on.

The Court: All right. [31]

EDNA ANDERSEN,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your anme.

The Witness: Edna Andersen.

Direct Examination

By Mr. Wheeler:

Q. Is it Miss Andersen? A. Yes.

Q. You were employed in the candy department of the Hollywood store, were you not?

A. Yes, I was.

Q. During what period of time were you employed in the candy division of the Hollywood store?

A. In the Hollywood store, since October, 1942.

Q. What was your position in the candy department? A. Division manager.

Q. Had you been previously employed in the candy department of Sears, Roebuck and Company? A. Yes, Sears' Pico.

Q. How long had you been employed in that department?

A. Almost two and a half years.

Q. Prior to 1942? A. Yes.

(Testimony of Edna Andersen.)

Q. You have recently terminated your employment with [32] Sears, Roebuck and Company?

A. Yes, on December 23rd.

Q. 1944? A. Yes.

Q. You are presently employed in Palm Springs?

A. No, my work doesn't start until February 15th.

Q. But you are living in Palm Springs at the present time? A. Yes.

Q. Calling your attention to Pan O' Butter Fudge, Miss Andersen, do you recall that fudge?

A. Yes, sir, I do.

Q. I show you a retail requisition on Sears, Roebuck and Company form No. 130343, and I will ask you what that requisition is.

A. This is the original requisition of the original amount of fudge received by us, checked in by my stock man, Mr. Hoffman.

Q. It was checked in on the date it bears?

A. November 19, 1943.

Q. And the amount as shown on that, as being checked in? A. 2,520.

Q. That amount was checked in by the stock man, under your supervision, is that correct? [33]

A. Yes.

Mr. Rolston: I am objecting to what anyone else did.

The Court: She was department head. She can testify as to that.

(Testimony of Edna Andersen.)

Mr. Wheeler: At this time I offer in evidence this retail requisition.

Mr. Rolston: I am going to object to its introduction into evidence. I have no objection to its being marked for identification, but it is no part of the evidence in this case, and is not binding upon us. Apparently all it is used for is to refresh the witness' recollection.

Mr. Wheeler: Oh, no.

The Court: For the present it may be received for identification only. I want it tied up a little more closely. I can't see the materiality, unless she is going to testify she received it, and testify to its condition. We will assume that Sears, being a store having agencies or branches, that they retailed that, or distributed that to their various retail branches for resale to the public.

Mr. Wheeler: That is correct. I was going to show by this witness the examination of the fudge that was made, the condition of the fudge, and so on.

The Court: Very well. After that you can do it.

The Clerk: Exhibit D for identification.

Q. By Mr. Wheeler: Miss Andersen, referring to this [34] Pan O' Butter Fudge, do you recall receiving it into the Hollywood store?

A. Yes, I do.

Q. What occurred at the time that it was received by you?

A. How do you mean,—checking it in and stocking it?

(Testimony of Edna Andersen.)

Q. Yes.

A. When receive merchandise on the dock I am notified; also my stock man is notified. He checks on the dock the quantity of boxes; then it is taken up to the receiving or marking room, and they check the amount of weight, and finish checking what the order is; then it is picked up by one of my regular stock men, or Mr. Hoffman, and put away in my stock room and locked up.

Q. Where is the stock room?

A. On the third floor.

Q. In what part of the building is it located?

A. What do you mean?

Q. Does it have any connection with or from any part of the sales area?

A. No, it doesn't; just offices, the marking room and checking room.

Q. Your stock room is separated from the offices?

A. Yes, it is. I have five stock rooms in a row, and each has an individual door and lock on them.

Q. The stock rooms are separated by solid walls, are they not?

A. My stock rooms aren't, but they are separated from the office of the building.

Q. Your candy stock room, and the other five stock rooms you have in that same area, aren't heated?

A. They are not; there is no heat whatsoever in them.

Q. What is the condition with reference to ventilation?

(Testimony of Edna Andersen.)

A. I have a large window in every store room that is open during the day, and closed in the evening.

Q. What was the temperature of the stock room?

A. In the wintertime a person couldn't stand in the stock room very long without a sweater on.

Q. With reference to the Pan O' Butter Fudge you received a large number of cases, and they were stocked in the stock room?

A. Yes, it was.

Q. When did you first open any of the packages for the purpose of examination and sale?

A. Whenever we receive any merchandise of that type we usually take it to the floor immediately, or as soon as we possibly can,—take it to the floor, and naturally we open it, and cut it to sell it, and also open it in the stock room to see what merchandise I did get in.

Q. How much did you take down, and how much would you [36] maintain as your floor stock?

A. I imagine around 100 pounds.

Q. On the selling floor? A. Yes.

Q. What did you observe with reference to this Pan O' Butter Fudge?

A. It was a very beautiful-looking fudge. This was very attractive when we first opened it.

Q. It had nuts on it?

A. Yes, it had pecans on it. It wasn't like a factory stock; it wasn't smooth on top, but more like it was hand-done.

(Testimony of Edna Andersen.)

Q. As you opened the boxes, how was it packed?

A. It was packed two slabs to a case, a case being about 16 to 17 inches long—almost a square case, and around three to four inches high.

Q. As you opened these cases for sale, what did you observe with reference to the fudge?

Mr. Rolston: I object to that as having already been asked and answered. She said it was beautiful and attractive.

The Court: You may answer.

A. Well, the answer would be the same answer, at first. After we had the fudge several days, the honey or syrup or molasses was running out on the floor, and made a mess. It [37] must have been——

Mr. Rolston: Just a moment——

Q. By Mr. Wheeler: It was very wet?

A. Yes.

Q. Did you observe anything else with reference to the fudge at that time?

A. Not at that time.

Q. Did you examine many of the boxes?

A. I had them in about 10 or 15 to the stack, and I examined a few of the top ones, on each stack.

Q. Was all of the fudge damp or moist and runny?

A. Yes, all of the cases were sticking together. That was about the first time I called Miss Pressy in Mr. Ashby's office.

Q. When did you call Miss Pressy?

(Testimony of Edna Andersen.)

A. Within the week we received the merchandise. I don't remember which day we received the merchandise, but it was within a week's time.

Q. Then did any change take place in the condition of the fudge as you observed it, on opening the boxes?

A. Yes, we were notified to open the boxes, and let in the air or let the air get to them to more or less dry this wetness it had, then I noticed when we took it to the floor, after being open, it would chip on the outside when we cut it. It was very dry. It had a chalky effect. [38]

Q. Later did it change color?

A. It got grayer.

Q. Did you observe any other change?

A. Not at that time.

Q. Did you observe any change at any later time?

A. Yes; we were notified again to check through our complete stock. That's when the stock man and myself went through every box, and each slab, and checked them. I noticed a large proportion of the cases were mouldy, and they had flies in them.

Q. Do you recall the date that you first began to notice that the fudge was becoming chalky and hard? A. No, I don't.

Q. Can you fix the date with reference to Christmas, whether it was prior to Christmas, or after Christmas?

A. No; I believe it was before Christmas. I no-

(Testimony of Edna Andersen.)

ticed it on the floor mostly, when it was being cut.

Q. I show you a retail requisition which is dated 1/22/44, No. 92845, and I will ask you what that requisition is?

A. This requisition is what we call a retail return. We have had returned 588 pounds to pool stock.

Q. Was the examination which you made of the fudge at the time that you discovered that some of it was mouldy—was that made at or about the time of that requisition? [39]

A. It was made before, and segregated from the other fudge.

Q. In other words, you made the examination and segregated the moldy portion? A. Yes.

Q. Was it the moldy portion which you returned? A. Yes.

Q. To pool stock under that requisition?

A. Yes, it was.

The Court: You had it weighed before you made your requisition?

A. No, it was marked on the outside,—each case, the weight.

The Court: You added it up? A. Yes.

Q. By Mr. Wheeler: The balance of the fudge that you had on hand you retained and sold?

A. Yes.

Q. During the period from the date of the receipt of the candy in the store, at what price was the candy sold?

(Testimony of Edna Andersen.)

A. When received in the store, did you say?

Q. Yes. A. 89c a pound.

Q. For what period of time was it sold at 89c a pound? [40]

A. I can't give you the exact date. I would say through Christmas. I really can't say exactly when.

Q. Showing you a mark-up/down form No. 142-886, dated January 11, 1944, I will ask you if you recognize that form?

A. Yes, this form will give you the date that I took the mark-down on this fudge from 89c to 69c. It was on January 11, 1944.

Q. Did you have any discussion with Mr. Ashby at the time that you made that mark-down?

A. Yes, before this period we had discussed it.

Mr. Rolston: I am going to object to everything after the word "Yes."

The Court: I think the sales price may be material, bearing on the question of damages.

Mr. Rolston: This is a conversation between this witness and Mr. Ashby.

The Court: If you don't want to show that they sold it for a less price.

Mr. Rolston: That evidence is already in. I did not make any objection to that.

The Court: She got authority. Leave it there. She had a right to reduce the price.

Mr. Wheeler: For the court's information, as a measure of damages, we have claimed the sales price of 89c, and we have also included as a meas-

(Testimony of Edna Andersen.)

ure of damages the mark-down [41] that was taken in January of 1944.

Q. I call your attention to the figures that appear on this mark-down form. I note the figures 1652. Will you explain that figure, Miss Andersen?

A. 1652 pounds was the amount we had to take a mark-down on. It was turned to gray and we feared——

Mr. Rolston: Just a moment—no objection.

A. It was turned to gray and rather than take a heavier mark-down later by keeping the stock we felt we could move it out faster at 69c than at 89c.

Q. By Mr. Wheeler: Did you observe anything else at the time that you marked it down with reference to the condition of the fudge?

A. As I said, I had segregated this several times. This 1652 was the part that was still good.

Q. What was the basis of the segregation that you made from time to time?

Mr. Rolston: To which I am going to object as assuming facts not in evidence.

Q. By Mr. Wheeler: What did you observe as to the condition of the fudge at the time you made the segregation?

A. I made two; whether there were more than two, I don't know. The first was, it was getting very sticky. The second segregation was made because of molding.

Q. The second segregation was made as of the date you [42] returned it to the pool stock?

(Testimony of Edna Andersen.)

A. Within a day or so. It takes about a day to get the papers written up, signed, and sent out.

Q. I show you a document which is entitled "Mailgram" dated 1/21/44, and bears the type-written signature of Mr. Ashby, and I will ask you if you received such a mailgram from Mr. Ashby? A. Yes, I did.

Q. Had you any discussion with Mr. Ashby prior to the time that you received that mailgram?

A. I can't say for sure whether it was Mr. Ashby or his secretary, but I know I had called the office several times.

Q. That was reference to the segregation of the candy?

A. Yes, the condition of the candy, as to the pecans and the mold.

Q. When you received this mailgram did it bear any figures in writing in the blank space? I will read it: "We have received special dispensation from L. A. pool stock and District Auditing Department for you to return at once to L. A. pool stock blank lbs. of the above fudge subject to the following." In that blank were there figures written in the copy that you received?

A. Yes, sir.

Q. What figure was written? [43]

A. 588 pounds. I believe Mr. Ashby or his secretary called and asked what figure we had—

Mr. Rolston: We object to the voluntary statement of the witness. She has answered the question.

(Testimony of Edna Andersen.)

The Court: That is not a voluntary statement. She was going to explain who put it in. It was a blank. You can object to my question if you want to. There is a blank here; in the typewritten memorandum there is a blank which indicates pounds. Was the poundage put in there?

A. Yes.

Q. Who put it in?

A. Mr. Ashby or his secretary, at the district office.

Q. You gave them the information?

A. Yes.

Q. You told them what you had segregated?

A. Yes.

Q. That was what? A. 588.

Mr. Wheeler: I have no further questions.

Cross-Examination

By Mr. Rolston:

Q. Miss Andersen, I believe you stated regarding the stock room, that is up on the third floor, and that it does not have solid walls, is that correct?

A. Let me explain the stock room. The walls dividing [44] my separate stock rooms are wood, and the rest is wiring.

Q. Lattice wiring? A. Yes.

Q. This candy was in the lattice wall portion?

A. The lattice portion; it just divided a certain section of the stock room off. The rest is boarded.

Q. How often would that stock room be opened and closed during the course of the day?

(Testimony of Edna Andersen.)

A. Some times 6 to 20 times a day; as much as the merchandise comes, as many times as you would have to go in to the stock room.

Q. This was during the busy time?

A. Yes.

Q. In other words, to the best of your recollection, the stock room was probably opened and closed 20 times or more a day?

A. Yes, at that period of time. We would always have the windows open unless it was too cold. We opened the windows when the store was first opened up, around 10:30, to closing time between 5:30 and 6.

Q. Did the windows open out on the store in general?

A. No, my own stock man or myself would open the windows.

Q. They connected between the stock room and what other part of the store? [45]

A. It was an open street, outside the wall of the building.

The Court: In other words, your stock rooms are built along a wall? A. Yes.

Q. And the partition between is to separate it from the other? A. The stock rooms?

Q. The stock partitions? A. Yes.

Q. In that stock room you carry nothing but candy?

A. Nothing but candy, and dried fruit.

Q. Things that go under the name of candy in the candy department? A. Yes, sir.

(Testimony of Edna Andersen.)

Q. Are there any shelves, or did you put the boxes right on the floor?

A. We have shelves, and sections for the different sized boxes and cases.

Q. By Mr. Rolston: That stock room had no cooling device or refrigerating system, did it?

A. No.

Q. How high were the stacks of Pan O' Butter Fudge?

A. I would say no higher than 10 cases, about three and a half to four inches to the case. [46]

The Court: They are hermetically sealed; they are all in cartons sealed, the way you receive them?

A. Yes.

Q. When you took any out did you leave a box open, or did you take the contents of the box as a rule?

A. We would take the whole carton to the floor. We never would leave part of a carton.

Q. You never took part, and would leave the rest exposed to the air?

A. No; the only time we exposed them to the air was when we were given information to do so.

Q. By Mr. Rolston: When you exposed them to the air you exposed them in the stock room or store room?

A. In the stock room, where they were originally put.

Q. How long did the stock stay in the store room?

A. I have nothing to do with the store room.

(Testimony of Edna Andersen.)

The merchandise would come in on the dock, and it was immediately sent up on the elevator to my stock room.

Q. After they are on the floor, are you in charge of selling them? A. Yes.

Q. Would any stock ever be returned from the floor back to the stock room? A. No.

Q. It was never returned? [47]

A. No, we only took down what we actually needed during the day's sale, and the stock was sold out during the day.

Q. No stock was ever returned to the stock room during that time, to your knowledge?

A. No.

Q. By the Court: During the holiday season would the stock you had for sale be about the same, or did you have to bring more down?

A. There was no certain amount which we sold. We sold maybe 500 pounds during the day. If there was need for more the stock room would bring it down.

Q. Where would you stock it?

A. On the shelves below the cases.

Q. Then you would open the box as you would need it? A. Yes.

Q. Then you would transfer it from the slab to the cases on the floor?

A. Yes, we had cutting shelves, and the girls would cut it and put it on trays, and put it on the shelves to be sold.

Q. And the remainder remained in the box?

(Testimony of Edna Andersen.)

A. Yes.

Q. By Mr. Rolston: Did you have a lot of new girls during the Christmas season, Miss Andersen? A. Yes.

Q. Did you have any trouble with the girls regarding [48] their disposition of cutting and selling fudge?

A. You take anyone, they don't like to get their fingers sticky or messy, and a lot of the girls wouldn't like it, but they would.

Q. If they had something else to do they wouldn't do the fudge?

A. No, if they were asked to do it, they would do it.

Q. The new girls? A. Yes.

The Court: You must have been a good manager.

A. I don't know. I had some good girls.

Q. By Mr. Rolston: Would there be any change in the fudge between the time you brought it down from the stock room and the time it was sold?

A. The only change would be, if it was cut and left too long, or if someone would cut up too much of it, it would dry out, and that would be the only thing.

Q. By the Court: Did you ever open up and take down more than the day's supply of this fudge as a rule?

A. No.

Q. Did you notice any decay that occurred from the time you brought down the fudge, and put it in the case for sale?

(Testimony of Edna Andersen.)

A. No, we would leave it in the original carton until we got ready to cut it. The stock boy would bring it down from the stock room and put it on the shelves below the case, [49] which was about two feet off the floor. As the girls needed it they would take out a slab at a time and put it on the trays.

Q. Did you ever see any change after they put it on the trays during the day?

A. If it was a very warm day it would dry out slightly on the outside.

Q. It wasn't very warm that time of the year?

A. No.

Q. You have testified to seeing conditions which indicated decay and mold?

A. Nothing like that happened in the case.

Q. Those are things you observed when you opened up the cases upstairs?

A. In the stock room, yes.

Q. By Mr. Rolston: Those things would be observed between the time you opened it in the stock room, and the time it was eventually sold downstairs? A. Yes.

Q. The stores are all lighted, are they not?

A. The sales part of the store is.

Q. The temperature is approximately 72 degrees?

A. That I wouldn't know exactly, sir.

Q. Was that a comfortable temperature?

(Testimony of Edna Andersen.)

A. Yes. [50]

Q. I believe you testified that the fudge was still good up to 1652 pounds?

A. What I meant by good was it was in a saleable condition.

Q. It was still saleable? A. Yes.

Q. If you had had more girls in your department, would you, in your opinion, have sold more of the fudge? A. No, sir.

Mr. Wheeler: I object to that as speculative.

The Court: You haven't pleaded contributory negligence here.

Mr. Rolston: It is not our burden to prove contributory negligence; or anything of that nature; they have the burden here.

The Court: That calls for the conclusion of the witness, because it does not develop how much she sold, how fast she sold it, or how many employees there were. There is nothing upon which to base the assumption.

Mr. Rolston: No further questions.

Redirect Examination

By Mr. Wheeler:

Q. Miss Andersen, with reference to the door to the stock room in which the candy was kept, did that door open into the sales area? [51]

A. There was no sales area on the third floor at all.

Q. Did the door directly leading into the stock-

(Testimony of Edna Andersen.)

room in which the candy was stored lead out to the office area? A. No, sir.

Q. In other words, there were a number of stockrooms in a walled-off area?

A. All the stockrooms are in the one large square. They all open into a large square. There are no offices in that area; nothing other than stock.

Q. In answer to a question you stated that if you kept the fudge for too long a period after cutting it would dry out and become grayish. What period of time was involved in your answer of "too long?"

A. I would say four or five hours. As a rule, the fudge would not stay on the trays that long. At that time we were very busy. Most of the girls would not cut up too much at a time—five or ten trays at a time, and when it got down to about half, they would cut a certain amount again, and it was a complete turnover.

Q. If it were left four or five hours it would tend to harden and become off color?

A. What I meant by off color was when we opened it, and it stood, it would get a gray color.

Q. At the time you opened it, what was the color? [52]

A. They were very moist, and dark.

Q. Dark brown? A. Yes.

Mr. Wheeler: No further questions.

Q. By the Court: How many girls did you have under you at that time?

A. Around 40. Behind the counter at one time

(Testimony of Edna Andersen.)

I would say there would be 10 girls. A counter was not very long; only 35 or 40 feet long.

Q. Were there any variations, so far as the increase in the number, about the time involved here, to the number you would have before?

A. Yes, during the regular time, when we don't have any rush sales, or Christmas, we have around 20 girls. At Christmas time it increases to 40.

Q. At that time you had 40?

A. I would say 30 to 40.

Recross Examination

By Mr. Rolston:

Q. Were these 30 or 40 girls new, having slight experience?

A. The girls I have had over a period of two years.

Q. All of them? A. Yes.

Q. Including the extras? [53]

A. We had very few. They worked short hours; they did not do anything but selling. They came in, and we were very busy, and they did nothing but selling.

Q. At no time did any of the fudge you examined in the stockroom become as hard as a rock?

A. At the last it was quite hard on the outside, at least. When the inside was cut it was soft, and the nuts, when we had it on the selling floor, would chip when we would cut it on the outside.

Q. That was after Christmas?

(Testimony of Edna Andersen.)

A. I can't give you the exact date.

Q. Was that after the mark-down?

A. I can't say for sure as to that.

Q. What is your best recollection, was it close to the mark-down time? A. I can't say.

Q. You can't give us any idea, as to when you noticed this condition?

A. At any time we received a block of it we opened it, and we would set it out in the air, and in a period of time it would have the same effect.

Q. As I understood your testimony, toward the latter time this happened as soon as you brought it downstairs? A. Yes, more or less.

Q. That was toward the end of the run, so to speak? [54] A. Yes.

Q. At or about the time of the mark-down, within a week one way or the other?

A. About that time.

Mr. Rolston: That is all.

Mr. Wheeler: No further questions.

(Whereupon an adjournment was taken until 1:30 p.m. of this same day, Tuesday, January 9, 1945.) [55]

Afternoon Session—1:30 O'clock

RALPH PARKER ASHBY,

recalled as a witness on behalf of the defendant, having previously been duly sworn, testified as follows:

Further Direct Examination

By Mr. Wheeler:

Q. At the time of the taking of Miss Andersen's testimony I neglected inadvertently, your Honor, to introduce the four exhibits to which reference was made.

Mr. Rolston: I have no objection to their being marked for identification, but I do object to their being introduced in evidence.

Mr. Wheeler: The retail requisition is dated 11/15/43.

Mr. Rolston: That is Exhibit D for identification?

Mr. Wheeler: Yes, Exhibit D for identification.

The Clerk: That is retail requisition No. 130343.

Mr. Wheeler: That is D for identification. Then the next one identified was retail requisition No. 92845, dated 1/22/44.

The Clerk: E for identification.

Mr. Wheeler: Then the mark-down form No. 142886, dated 1/11/44 would be——

The Clerk: F for identification. [56]

Mr. Wheeler: And the mailgram dated 1/21/44 would be G for identification.

Q. By Mr. Wheeler: Mr. Ashby, did you have

(Testimony of Ralph Parker Ashby.)

any further communication with Mr. Bower concerning the Pan O' Butter Fudge?

A. On January 20 or 21 I wrote Mr. Bower a letter outlining the entire story of the fudge in detail.

Mr. Rolston: Just a minute. I object to any statement of the witness as to what was in the letter. The letter speaks for itself; it is the best evidence.

The Court: There is no objection to his stating the subject he discussed in the letter.

Mr. Rolston: All right.

A. I sent it to him by registered mail.

Q. By Mr. Wheeler: I show you a copy of a letter dated January 20, 1944, addressed to Bower-Giebel Wholesale Company, attention Mr. Earl Bower. I will ask you if that is a copy of the letter that you received.

A. That appears to be a copy of the letter.

Mr. Rolston: May I see the letter, Mr. Wheeler?

Q. By Mr. Wheeler: I will ask you to examine a letter of the same date, which bears your signature, and ask you if that is the letter which you sent.

A. This is the original, without the pencil notations.

Q. In other words, there appear to be pencil notations along the side, and some interpolations, that were not placed there by yourself, or were not on the letter at the time you sent it?

A. That's right.

(Testimony of Ralph Parker Ashby.)

Mr. Wheeler: At this time I offer in evidence this letter as Defendant's Exhibit H.

The Court: It may be received.

The Clerk: The letter of January 20, 1944, is marked Defendant's Exhibit H.

Q. By Mr. Wheeler: Referring to the mail-gram which has been marked for identification as Defendant's Exhibit G, I will ask you, Mr. Ashby, if you sent such letters to the various stores in the Los Angeles district? A. I did.

Q. Mr. Ashby, prior to the time that you came to Sears, Roebuck and Company did you have experience in the candy business? A. I did.

Q. What was that experience?

A. A number of years immediately prior to coming with Sears I was the seller of candy.

Q. For what company?

A. The E. A. Hoffman Candy Company.

The Court: Is that a local concern?

A. Yes, sir. [58]

Q. By Mr. Wheeler: How many years were you so employed? A. With E. A. Hoffman?

Q. Yes.

A. About two years, approximately.

Q. Did you have any other experience in the candy business?

A. Yes, previously to that I was seller of candy for the Triangle Candy Company, Los Angeles.

Q. For what period of time?

A. That was also about two years.

Q. Did you have any further experience?

(Testimony of Ralph Parker Ashby.)

A. Yes, previous to that I was candy manager for the H. S. Kress Company for about five years.

Q. Prior to that did you have any experience in the candy business?

A. No. I beg your pardon; it was probably longer than five years; from 1928 to about 1934 or 1935; somewhere in there.

Q. During the period of your experience with candy, have you had experience with fudge?

A. Yes.

Q. Over what period of time?

A. During all this time. When I was with H. S. Kress Company I was merchandise manager in the candy department, [59] and one of the principal items in that department was fudge. When I was a salesman I sold a lot of fudge myself.

Q. Are you familiar with the qualities relating to fudge as a candy? A. I believe I am.

Q. Mr. Ashby, from the examination that you made of the sample of candy that you examined in Mr. Bower's office did you form an opinion as to the type or quality of fudge that it was?

A. I did.

Mr. Rolston: Just a minute. I am going to object to that. I don't think there is any issue on that point, your Honor. I don't think this is the proper witness for it.

The Court: He has shown himself experienced in the field, and he may say whether it was in an edible condition or a saleable condition, and things like that. We have already had it described. Some

(Testimony of Ralph Parker Ashby.)

of it was sticky, runny, some had mold. I think that can be answered yes or no, and then get down to the particular thing. Read the question, Mr. Dewing.

(Question and answer read by the reporter.)

The Court: The answer will stand.

Q. By Mr. Wheeler: What opinion did you form as to the grade or quality of the fudge? [60]

Mr. Rolston: To which I will object upon the ground that there is no issue as to the grade or quality of the fudge in this particular case, your Honor.

Mr. Wheeler: I will withdraw the question, your Honor.

Q. From your experience or based upon your experience, did you form an opinion as to the length of time that such fudge could be held?

Mr. Rolston: I object to that as outside the issues of the case.

The Court: I think you are anticipating.

Mr. Wheeler: I am, your Honor.

The Court: I don't think you should. It is quite evident from the sales order that the shipments were to cover a period of weeks, and I don't think it is material at the present time to determine whether they held it too long. It may be, later on.

Mr. Wheeler: I will withdraw the question.

The Court: I will sustain the objection at the present time.

Q. By Mr. Wheeler: Did you make any effort

(Testimony of Ralph Parker Ashby.)

to dispose of the candy that was returned to the pool stock warehouse, Mr. Ashby.

A. I did.

Q. Could you dispose of it? [61]

A. I could not.

Mr. Rolston: To which I am going to object on the ground that it calls for a conclusion.

The Court: I think he ought to state what he tried to do, rather than his conclusion.

Q. By Mr. Wheeler: What did you do?

A. What do you mean? What my efforts were along that line?

Q. Yes, what you did.

A. I called a man in town here I knew dealt in merchandise that was not always top quality, and talked with him on the phone, to see if I could get him to dispose of some of it.

Q. By Mr. Wheeler: What was the man's name? A. His name was Clark.

Q. Do you know his full name?

A. I do not.

Q. He is present in the courtroom, is he?

A. He is.

Q. I am advised that his name is H. P., for the purpose of the record. Was he willing to take the candy? A. He was not.

Q. Did you make any further effort to dispose of the candy? A. I did not. [62]

Q. Did you have any discussion with reference to re-cooking the candy?

(Testimony of Ralph Parker Ashby.)

Mr. Rolston: With whom.

Q. By Mr. Wheeler: Any discussion.

A. I talked to——

Mr. Rolston: Just answer yes or no, Mr. Ashby, please.

The Court: Go ahead and say yes or no.

A. Yes.

Q. By Mr. Wheeler: With whom did you have that conversation?

A. I talked with a member of the firm of the Triangle Candy Company.

Q. Was that company willing to take the Pan O' Butter Fudge that you had in the warehouse, for the purpose of re cooking it?

Mr. Rolston: I am going to object to that as calling for the conclusion of the witness, as to whether this other company was willing to do anything.

Q. By Mr. Wheeler: State the conversation that you had.

A. I asked this member of the firm of Triangle Candy Company if they would be willing to re cook the fudge, to make it into a saleable commodity. He said no, that they did not do that, and in no case would they re cook somebody else's [63] fudge.

Q. Did you make any further effort to dispose of it? A. I did not.

Mr. Wheeler: I have no further questions.
Cross-examine.

(Testimony of Ralph Parker Ashby.)

Cross Examination

By Mr. Rolston:

Q. Regarding this discussion with the Triangle, when did that occur?

A. The discussion with who?

Q. With the Triangle Candy Company.

A. Some time—I don't have the exact date, but some time between the last arrival of the fudge and January 20th. That would be some time between December 6th and January 20th.

Q. By the Court: Was that before you wrote this letter to Mr. Bower?

A. It was.

Q. Who did you talk to, Mr. Kennepohl?

A. That's right.

Q. I happen to know that, because they had a case in this court; that is, a different kind of case; a pure food case.

Mr. Rolston: That was probably the reason they refused to cook anybody else's. When did you talk to Mr. Clark concerning disposing of it to him? [64]

A. I don't recall the date. Some time in this same period.

Q. Prior to January 20th?

A. Prior to January 20th.

Q. It couldn't have been several months later, could it?

A. It couldn't have been.

Q. How many conversations with Mr. Clark did you have?

A. I believe I only had one conversation with him directly.

(Testimony of Ralph Parker Ashby.)

Q. By the Court: Did he come out to the plant to look at the candy?

A. No, sir, I called Mr. Clark's home, and a lady who said she was Mrs. Clark said he was not at home; but would be home about——

Q. Not that. After you talked to him, did he come out and look at it?

A. No, he did not go into the matter at all.

Q. By Mr. Rolston: To your knowledge?

A. He didn't look at our fudge.

Q. Where was the fudge stored on January 20th?

Mr. Wheeler: I object to that as not being the best evidence.

A. I don't know. The records would show that.

The Court: What?

A. I don't know where it was stored on that date. The [65] record that my attorney has would show that.

Q. Did you accumulate all the fudge from all these stores together?

A. Yes, but I personally did not get into that end of the business.

Q. But you had it together in one place?

A. That's right.

Q. By Mr. Rolston: Do you recall when it was gathered together in one place?

A. I don't recall the date. The records will show that.

Q. Do you have records? Let us find out.

Mr. Wheeler: Can you fix the date?

(Testimony of Ralph Parker Ashby.)

A. It would be prior to January 31st; some time between January 18th or 19th and January 31st.

Mr. Wheeler: For the purpose of the record, if it will expedite it, the records which will be subsequently introduced indicate that it was collected in the pool stock warehouse on January 21st and 22nd, with one shipment being received January 31st.

Q. By Mr. Rolston: Mr. Ashby, do you know how many pounds of fudge you had left on hand for disposal prior to the accumulation in the pool stock warehouse?

A. I do not know the exact amount. I know approximately. [66]

Q. Did you tell Mr. Clark approximately how many pounds you had?

A. It was approximately 10,000.

Q. Did you tell Mr. Clark that in your conversation with him?

A. I don't believe I said the amount; no; I don't recall saying the amount.

Q. Did you discuss any price with him?

A. Yes, there was discussed a price.

Q. At what price did you offer the merchandise to Mr. Clark?

A. I believe the price—he asked me the price that I wanted, and if I remember correctly, it was approximately 20c a pound, or in the neighborhood of that.

Q. Mr. Ashby, going back to the first conver-

(Testimony of Ralph Parker Ashby.)

sation you ever had concerning this fudge, that was on or about October 20th or 21st?

A. Do you mean the original conversation?

Q. That's right. Going back to that, isn't it a fact that when that fudge was cut, some of it stuck to the knife? A. A very tiny bit.

Q. Isn't it a fact you told them to wet the knife, and you would eliminate that sticking quality of the fudge?

A. I don't recall saying that. [67]

Q. Do you recall somebody going back and wetting the knife?

A. I don't recall it, but it possibly could have happened.

Q. But you do recall that some of the fudge stuck to the knife? A. A very small amount.

Q. During the conversation, you testified you had some further discussion regarding the change of the features by adding pecans.

A. I merely told Mr. Erhart—there were three gentlemen standing there—that I would like to have more nuts added, both on top and in the mixture.

Q. In the mixture? Did you ask what type of nuts would be added, half pecans or chopped?

A. I wanted larger sized pecans on top.

Q. Any particular size?

A. Just larger than what they had.

Q. Was there any particular size of nuts that you wanted scattered throughout the fudge?

(Testimony of Ralph Parker Ashby.)

A. No, the nuts weren't to be scattered whole; they were to be ground up.

Q. Did you ever see any sample of the fudge with the pecans in it ground up? [68]

A. This sample which we were cutting had ground-up pecans in it. I was merely asking for a larger proportion of the pecans.

Q. There were pecans all the way through this fudge?

A. Yes, there were, but not enough, in my opinion.

Q. During the conversation is it not a fact that Mr. Bower told you that he had no experience or knowledge concerning bulk fudge?

A. That is true. I would like to qualify that by saying bulk candy of which this was a class of bulk candy.

Q. As a matter of fact, he told you he had no experience with the type of bulk candy?

A. That's right.

Q. You told him you had lots of experience, is that right? A. That's right.

Q. In purchasing the fudge you were relying upon your own experience with fudge and fudge products and bulk candies, were you not?

A. To some extent.

Q. You were not relying upon any custom or usage in the business, were you?

A. I was.

Q. Mr. Ashby, I am showing you a copy of your deposition, which was taken two weeks ago,

(Testimony of Ralph Parker Ashby.)

November 29th, and call [69] your attention to page 35, and ask you to read from line 6, through line 7. Read it to yourself. Mr. Ashby, at the time of your deposition, November 29th, isn't it a fact that you testified as follows to the following question:

“Q. Did you rely upon any custom or usage in the business? A. No.”

Was that your testimony at that time?

A. That was my testimony at that time.

Q. Mr. Ashby, did anybody connected with Bower-Giebel Wholesale Company at any time tell you that this fudge was merchantable or usable or saleable—use any of those words?

A. Not directly, no.

Q. Did you, at any time, Mr. Ashby, examine any other sample of the merchandise prior to the receipt of your first shipment?

A. I don't recall any, no.

The Court: Except the one sample that he showed you?

A. The sample I brought from him, yes.

Q. By Mr. Rolston: Is it not a fact that within the first two or three days of November Mr. Bower called you over to his office to show you another sample that had just arrived?

A. I don't recall that particular instance.

Q. Possibly I can refresh your memory. You save [70] stamps, do you not, Mr. Ashby?

A. I do not.

(Testimony of Ralph Parker Ashby.)

Q. You are not a philatelist? You know what a philatelist is? A. Yes.

Q. Do you save stamps of any other person?

A. Well, I may have taken some stamps off of the carton around there, that was something unusual, yes.

Q. Wasn't that a carton of pecan fudge, that was just airmailed special delivery from Chicago?

A. I don't recall this particular instance you are bringing up at all, although it could have happened.

Q. I am trying to refresh your memory, Mr. Ashby, by calling your mind to stamps. During the conversation in the first part of November, isn't it a fact that Mr. Bower pointed out, in a new sample, that this was a sample of the type of merchandise being shipped, and it had more pecans in it than the other sample? Does that help you refresh your memory as to such conversation? A. He could have, yes.

Q. That is the incident in which you cut some stamps off of the carton; some \$15.00 worth of postage stamps?

A. I may have done so.

Q. Did you take any part of that sample and put it in your little sample cabinet? [71]

A. I did not.

Q. Did you take a sample with you at that time? A. No.

Q. Are you sure of that?

A. Reasonably sure, yes.

(Testimony of Ralph Parker Ashby.)

Q. Was that sample cut?

A. I don't recall.

Q. Do you recall the condition of that sample, whether it was wet, or any wetter than the original sample?

A. That particular sample, as far as my memory serves me, was satisfactory.

Q. You definitely recall the incident at that time, do you not?

A. May I explain something, Judge?

The Court: Yes.

A. I was calling on Mr. Bower from one to three times a week during this time, and there must have been, roughly, 18 or 20 or 25 calls. This incident may have happened. I don't specifically recall it.

Q. You are not supposed to be infallible.

A. There were so many calls at his office, and so many conversations I don't recall outside of certain instances where there are some records to back up the things that happened. I don't recall every conversation we had.

Q. By Mr. Rolston: If I brought the box with the [72] stamps which were used into court, would not that refresh your recollection better?

A. I will stipulate that I took them.

The Court: He has stated this may have taken place.

Mr. Rolston: I am just trying to use that to refresh his recollection as to the appearance of the sample he saw on that day.

(Testimony of Ralph Parker Ashby.)

The Court: He has no recollection of the sample. He says the incident may have taken place.

Q. By Mr. Rolston: Do you have now any further recollection of the sample shown to you on that day?

A. It may have taken place. I recall something along that line.

Q. Do you recall what the sample looked like that you saw upon that occasion?

A. I would recall that it looked satisfactory.

Q. Do you recall whether or not it looked any wetter than the original sample?

A. No, I don't recall whether it was any wetter. The original sample was not wet.

Q. Do you recall whether or not there was any indentation, or accumulation of moisture around the pecans that were on top?

A. On the second sample?

Q. On the second sample. [73]

A. I don't recall that. To my knowledge there was none.

Q. You have testified to a conversation which you had on or about November 25th, and I believe you testified it may have been a day either way, is that correct? A. That is correct.

Q. You have also testified that upon that occasion you brought a sample to the store of the Bower-Giebel Wholesale Company?

A. That is correct.

Q. What was the nature and general appearance of that sample?

(Testimony of Ralph Parker Ashby.)

A. The nature of the sample,—it was in a small bag. The sample was very, very wet and moist; so much so, in carrying it down from my office to Bower-Giebel it ran together in the sack.

Q. In other words, at that time, by the time you were through handling it it looked like a ball, isn't that right?

A. Everybody in the office handled it, so by the time they got through, I would say it was.

Q. Where did that sample come from, Mr. Ashby, if you recall?

A. I don't recall exactly. My memory is that that came from the Boyle store shipment.

Q. Do you mean from the pool stockroom?

A. No, from the Boyle stockroom.

Q. Is that the East Olympic store?

A. The distribution had been made from the pool, and I merely got this sample from that particular portion of the shipment that was sent to the Boyle Street store.

Q. Do you recall what portion of the shipment went to the Boyle Street store?

A. Do you mean——

Q. My question is, do you recall?

A. No, I don't recall, other than it was some part of the first few shipments. The record will show that.

Q. Part of the first few shipments?

A. Yes.

Q. Would this paper sack, or sample which you

(Testimony of Ralph Parker Ashby.)

brought, which was in a paper sack, be described as a 9-pound slab? A. No.

Q. It was smaller than that?

A. I don't know how much was in there. I would say maybe a pound or two pounds; something like that.

Q. At that time you had not received over 5,000 pounds, had you?

Mr. Wheeler: I object to the question as being not the best evidence.

The Court: If he knows. You may answer.

A. I would say that I am not positive, because the warehouse [75] records will show all those exact shipping times, and when the individual stores got their shipments, and so forth.

The Court: All right. It doesn't matter.

Mr. Rolston: Rather than have the witness go through and read the deposition, will you stipulate in the deposition he testified he brought a 9-pound slab?

Mr. Wheeler: Yes.

Mr. Rolston: And that was the first shipment, and he qualified that by adding it could have been the first or second shipment?

Mr. Wheeler: He qualified it further, and said it might have been sent in the fourth shipment. To the extent of his knowledge, I will stipulate.

Q. By Mr. Rolston: In your direct testimony, Mr. Ashby, did you testify as to all of the conversation you had with Mr. Bower on November 25th?

(Testimony of Ralph Parker Ashby.)

A. I did not hear all of the question.

Q. Read it.

(Question read by the reporter.)

A. I did.

Q. Is it not a fact you further discussed the question as to whether or not Sears was going to pay for the merchandise?

A. My recollection is I verbally told Mr. Bower that our practice was, in a case of that kind, where the merchandise [76] was not satisfactory, or there was any doubt, to stop payment on it.

Q. Isn't it a fact that you told him at that time that you were going to stop payment on his account?

A. It is.

Q. Or on his invoice?

A. It is.

Q. You actually gave him that verbally, whether it was the practice of Sears or not, is that true?

A. Do you mean that I told Bower?

Q. Yes.

A. I did.

Q. At that time did you ask him whether or not he could stop payment on his checks to Karmelkorn Kommissary?

A. I did not.

Q. Was that discussed at that time?

A. I don't recall that was discussed at all.

Q. Do you recall the incident where Mr. Bower called his secretary over, in your presence, and dictated a letter to the bank, stopping payment on his checks to Karmelkorn Kommissary?

A. I don't recall the incident.

Q. Do you have any recollection at all of such a conversation at that time, during which Mr.

(Testimony of Ralph Parker Ashby.)

Bower said he was going to stop payment on his checks? [77]

A. I don't recall the conversation, but in the course of the discussion about the fudge it could possibly have come up.

Q. Do you have any recollection of that?

A. Nothing other than what I have just stated.

Q. I call your attention to your deposition, page 14, line 18, and ask you to read the question and answer appearing there. A. Yes.

Q. Did you testify as a matter of fact, at the time your deposition was taken—I had better have you go back and read the previous few sentences; beginning line 7, page 14. Is it not a fact, Mr. Ashby, at the time of the taking of your deposition on December 29, 1944, at your attorney's office, the following questions and answers were made:

“Q. Did he discuss”—referring to Mr. Bower—
“Did he discuss at that time whether or not they could stop payment on any checks?”

“A. Whether he could?”

“Q. Yes.

“A. He might have. I don't remember.

“Q. As a matter of fact, you asked him whether or not he had paid for it and he said, ‘My gosh, you saw me give them a \$7,000 check in advance, but there are some out that may be [78] stopped,’ and he went out and dictated in your presence a stop-payment order?”

“A. It is quite possible he did.

(Testimony of Ralph Parker Ashby.)

“Q. Would you say that he did do that in your presence?”

“A. I don’t recall it. There was considerable conversation about it, and I have a faint recollection that there was something about stopping his checks.

“Q. Do you have a faint recollection whether or not he called the girl over and dictated a stop-payment to the bank right then and there?”

“A. Yes, I believe there was something like that.

“Q. He dictated the stop-payment on four checks? A. I suppose he did.”

At the time of your deposition did you so testify?

A. There was some dictation——

The Court: Counsel stipulated.

Mr. Wheeler: Yes, that is what he said.

Q. By Mr. Rolston: Did you go on and make any other purchases at that time, Mr. Ashby, of any other merchandise other than fudge?

A. I believe there was. The purchase orders would show that. As I said before, we were in the process of buying goods on almost every visit.

The Court: You bought other things from him from year to year? [79]

A. From Mr. Bower?

Q. Yes.

A. Yes, I have been buying for, I believe, about 12 or 15 months.

Q. From him? A. Yes.

Q. For Sears? A. That’s right.

Q. By Mr. Rolston: The conversation with Mr. Bower, which you have just related concerning the

(Testimony of Ralph Parker Ashby.)

sample of fudge in the paper sack, and the stop-payment discussion which occurred,—could that conversation have occurred as late as November 29th?

A. It could not.

Q. It could not have occurred as late as that?

A. It could not.

Q. If I show you a purchase order dated November 29th, would that refresh your recollection in that regard? What is your answer to the last question, please?

A. I want to see the purchase order before I answer that question.

Q. I show you two purchase orders bearing Nos. 12732 and 12733, both bearing date of order 11/29/43, shipping date 11/29/43 on one, and shipping date on the other 12/1/43.

A. This is my purchase order. [80]

Q. Does such purchase order refresh your recollection as to when that conversation regarding the sample occurred?

A. So far as my memory is concerned the conversation that you are referring to took place prior to November 29th.

Q. If I told you that November 29th was on Monday, would that change your answer in any way?

A. No. It confirms my answer.

The Court: This is wasting time.

A. That is what definitely fixes it in my mind.

Q. By Mr. Rolston: Did you actually stop payment on your account to Bower-Giebel?

A. We did not stop payment.

(Testimony of Ralph Parker Ashby.)

Q. You did tell Mr. Bower you stopped payment? A. That's right.

Q. I believe you testified that your next conversation concerning the discussion of fudge, after the one you testified to, was on December 2nd, is that correct? A. That's right.

Q. Is that the same conversation that you placed at an earlier date in your deposition?

A. Yes; in the deposition I was somewhat unsure of the dates other than it was after this, and was December 2nd.

Q. Do I understand that is the same conversation you related at that time?

A. That's right. [81]

Q. That was a telephone conversation?

A. That is correct.

Q. During the conversation is it not a fact that Mr. Bower asked you whether or not you were releasing the hold on his accounts?

A. I don't recall whether he exactly said that or not.

Q. Or words to that effect?

A. He might have said something to that effect, yes.

Q. What was your answer to that question.

A. My answer was yes, because——

Q. Your answer was yes, you were releasing the stop-payment thereon? Was that your answer?

A. We never put it on so we couldn't release it.

Q. You told him it was put on?

(Testimony of Ralph Parker Ashby.)

A. All right, I told him, but that is still my answer.

Q. You had told him?

A. I had told him, but I had never bothered the accounts payable, which has to be done in writing to put a stop-payment on his account.

Q. Is my recollection correct, Mr. Ashby, that you did testify that in that conversation on November 25th, or thereabouts, you told him you were going to stop payment? A. That is correct.

Q. Did Mr. Bower, during that conversation, ask you whether or not it would be all right for him to release payment [82] on his stop orders?

A. I don't recall his asking that question.

Q. Or a similar question?

A. Or a similar question.

Q. Do you recall his talking at all about the checks being released?

A. I will have to explain that answer.

The Court: You can answer yes or no, and then explain it.

A. I don't recall the question, I mean, his asking me that, because I was not concerned about his end of the transaction, to the point that I remember exactly what he said about his end of it.

Q. By Mr. Rolston: Did you have a conversation with Mr. Bower the day after this telephone conversation, on or about December 3rd, during which a further discussion was had regarding his, Mr. Bower's, checks?

A. I don't recall any of the subsequent conver-

(Testimony of Ralph Parker Ashby.)

sations. As I say, I was down at Mr. Bower's place almost every day, and it possibly could have been discussed.

Q. Do you recall during a conversation, on or about December 3rd, when Mr. Bower saw you in the morning and said, "Seeing you reminds me" or words to that effect—"Seeing you reminds me of the fact that I have not notified the bank to cancel my stop-payments." Do you recall that, and do [83] you recall his calling over his secretary and telling her to write a letter to the bank withdrawing the stop-payment?

A. I don't recall that incident.

Q. Do you recall the dictation incident, on or about the 2nd or 3rd?

A. I don't recall that specific instance, no.

Q. Did you discuss the fudge on the morning of the 3rd?

A. As I said, we might have. I don't recall it.

Q. Did you have any discussion at all with Mr. Bower between December 2nd and the conversation you have testified to as being just prior to Christmas, in which fudge was discussed?

A. We had only a particular off-hand remark. It was not exactly a conversation, prior to Christmas, that I specifically recall.

Q. Do you recollect a conversation during which you told Mr. Bower that the fudge was selling all right, but the girls weren't handling it, and you were having a lot of trouble with new girls, and further, to the effect that it was messy handling?

(Testimony of Ralph Parker Ashby.)

A. I stated that some time during that period, but I want to qualify that remark, if I may.

The Court: Yes.

A. The reason I want to qualify it is because that is [84] just an excerpt from the conversation in general. The preamble of that remark was the fact that we could not do all this lying of fudge around, and so forth, that Mr. Erhart had suggested, because we had a lot of green girls who would not know what it was all about, and when they would see all this fudge lying around our stockrooms, open, it would give them the wrong idea of how Sears did business.

Q. By Mr. Rolston: When did you have that conversation with Mr. Bower?

A. I don't recall. It was in that period.

Q. You told Mr. Bower that on December 2, 1943, in the telephone conversation?

A. I don't think it was. I don't recall that over the telephone.

Q. Have you ever seen Mr. Bower, after the time he came up to you, prior to your telephone conversation with Mr. Bower on December 2nd, and before he came up to you in January?

A. I only saw Mr. Bower twice.

Q. Those two times that you have mentioned?

A. Yes.

Q. Did you ever tell Mr. Bower that you never wanted to hear the word "fudge" again; it was too messy?

A. I certainly did.

(Testimony of Ralph Parker Ashby.)

Q. That was during this same period, wasn't it, between [85] December 2nd and Christmas?

A. It was.

Q. Did you ever tell Mr. Bower that during that time you almost lost your shirt over that fudge; that you over bought?

A. I could have said that.

Q. Do you have a recollection of ever having said it?

A. I can't recall specifically, because that is merely an excerpt from a continuing conversation over weeks.

The Court: You were wrangling continuously, is that the idea?

A. As I mentioned before, your Honor, I was seeing that gentleman two or three times a week, and there was possibly some crack or remark made each time. After all, we were doing a lot of business. I was down there quite often.

Q. By Mr. Rolston: In other words, Mr. Ashby, every time you saw Mr. Bower there was some discussion about fudge, wasn't there?

A. It might have been just merely how was the fudge; that was all.

Q. And the answer was: Pretty messy for handling it, but we are selling it?

A. We are selling it, as far as we are going along. That might have been one of the particular remarks, yes. [86]

Q. You recall telling him you almost lost your job over the fudge incident?

(Testimony of Ralph Parker Ashby.)

A. I might have said that.

Q. And that you over bought the item?

A. I did not say that.

Q. You never told Mr. Bower that you over bought the item? A. I did not say that.

Q. Did you have any conversation with Mr. Bower between Christmas time and New Years?

A. I don't recall any conversation with Mr. Bower between Christmas time and New Years.

Q. Were your stores open at that time?

A. They were open five days, I think, a week. We were closed on Saturdays, Mondays and Sundays. I know there were three days there they didn't work.

Q. Upon the occasion that you came in to Mr. Bower's place of business, in January, I think you testified January 4th? A. That is correct.

Q. You brought a slab sample at that time?

A. That was the time in my deposition I got the two visits mixed up. That was the time I brought in the 9-pound slab.

Q. That was the dry slab? [87]

A. I had two.

Q. Did you make a purchase of other commodities at that time?

A. I don't recall. The purchase orders will possibly show that.

Q. Did you tell Mr. Bower at that time that you were going to stop payment on his invoices?

A. I don't recall saying that at that time, no.

Q. Did you ever tell Mr. Bower, subsequent to

(Testimony of Ralph Parker Ashby.)

that first conversation in November, that you were going to stop payment on the invoices or on his account? Did you ever tell him at any time except that once?

A. I told him in this letter that I wrote him.

The Court: He means orally, did you tell him?

A. I don't recall writing him again after the first instance.

Q. By Mr. Rolston: Do you recall when you actually stopped payment on his invoices?

A. I stopped payment on his invoices — do you mean the exact date?

Q. Yes.

A. No, but I recall that I did. The accounts payable would possibly show that.

Q. I show you a letter in handwriting dated 1/12/44, addressed to Saxe, and apparently bearing the signature of [88] R. P. Ashby. Is that your signature? A. That is my signature.

Q. Is that your handwriting?

A. That is my handwriting.

Q. Is that the date upon which you stopped the invoices?

A. I would presume it is. That is not my handwriting on there. I told Mr. Saxe, verbally phoned to him, and he said I had better put it in writing. I wrote this out. We don't have a form for this sort of thing, so I just wrote it on that memo and sent it up with my secretary. I presume that is his handwriting.

(Testimony of Ralph Parker Ashby.)

Q. To the best of your recollection that was on or about January 12? A. That is right.

Q. It is true, isn't it, Mr. Ashby, that to your knowledge the fudge had been paid for, or a vast majority of the fudge had already been paid for?

A. I wouldn't know, to my knowledge, exactly what the status of Mr. Bower's account was at that particular moment; I mean, on January 12th.

Q. Did you ever check his account at a later time to see whether or not the fudge was paid for?

A. I looked into that only—I have never actually checked as to the fudge itself; I merely checked into how much money was running through on his account. In other words, [89] if I might qualify that, we don't pay by statements; we pay by invoices. Where there is a continuing relationship, such as with Mr. Bower, and money is being paid out, the bills are being paid all the time. There is no particular time when they are piled up and all paid.

Q. They are paid on invoices?

A. That's right.

Q. Do you have the original invoices for this fudge? A. Yes.

Q. If I recall your testimony, Mr. Ashby, at no time had you ever advised Mr. Bower that the fudge was moldy, is that true?

A. I have never advised him?

Q. Yes, of its moldiness.

A. That is not true.

Q. When was the first time you ever advised him that it was moldy?

(Testimony of Ralph Parker Ashby.)

A. On either November 24th, 25th or 26th. In other words, prior to the visit of Mr. Erhart, which was definitely fixed as November 29th, by an order which my attorney has.

Q. Isn't it a fact, Mr. Ashby, that your conversation with Mr. Bower was on the morning of the same day Mr. Erhart came up to see you?

A. Which conversation?

Q. The conversation you referred to, that is, the [90] conversation of November 24th, 25th or 26th.

A. It was on the morning of the day before Mr. Erhart came? No.

Q. The day that Erhart came.

A. It was previous. My original conversation with Mr. Bower was previous to the visit of Mr. Erhart.

Q. Did Mr. Erhart go there in the morning or afternoon?

A. I don't recall the exact time. I believe it was just about noon; noon, or very close to it.

Q. Did you see Mr. Bower on the same day?

A. I don't recall that I did at that time. It is quite possible.

Q. Did you have a conversation with Mr. Bower on January 10, 1944?

A. I don't recall that date as being January 10th particularly; it might have been.

Q. I say, did you have a conversation with him?

A. I guess I did. I don't recall the date. I don't recall any particular conversation on January 10th.

Q. The conversation you are referring to on

(Testimony of Ralph Parker Ashby.)

January 4th could not have occurred that late, could it? A. It could not.

Q: I will show you two purchase orders, Nos. 4257 and 4258, both orders showing the date of January 10, 1944, and [91] ask you if that is your signature? A. That's right.

Q. Did you have any discussion with Mr. Bower on that day?

A. I might have. I don't recall any discussion of the fudge on that particular date.

Q. You don't recall a conversation regarding fudge at that time?

A. No, other than my previous testimony as to the fact that on each of my various visits two or three times a week there may have been some more or less discussion of this item.

Q. Mr. Erhart came to see you when in January?

A. The second visit was January 12th.

Q. You don't mean there were two visits in January? A. What?

Q. You don't mean Mr. Erhart visited you twice in January? A. No. His second visit to me.

Q. Did you see Mr. Erhart on that day?

A. I don't recall seeing him. May I go back?

Q. Surely.

A. On January 4th, when I called this to Mr. Bower's attention he said he would have to get hold of a gentleman by the name of Bob Mitchell, who was in on the original purchase. [92] I gathered from my listening on my end of the conversation—

(Testimony of Ralph Parker Ashby.)

Mr. Rolston: I am going to object to any conclusion of this witness.

A. It isn't a conclusion. He talked with somebody. He said, "Bob Mitchell will be around on the 6th—either the 6th or 7th, and we will come over to see the fudge."

Q. He told you that? A. Yes.

Q. But Erhart did not get there until the 12th, is that right?

A. I called Mr. Bower on the 7th. I actually talked to him on the 6th or 7th. He said Mr. Mitchell had not shown up, and he was not coming over until he could get one of the representatives of Karmelkorn.

Q. Mr. Erhart and Mr. Mitchell did appear at your office on or about January 12, is that correct?

A. That is correct.

Q. Did you have any conversation with Mr. Bower on that day?

A. I don't recall. I don't believe, however, it was that day.

Q. If I show you the original purchase order, which is dated January 12, 1943, No. 4312, would that help you refresh your memory as to whether or not you saw Mr. Bower?

A. It would not particularly prove anything, or [93] refresh my memory.

Q. Whether it proves something, Mr. Ashby, is not your concern. I ask whether or not it refreshes your memory.

A. It does not refresh my memory. I might have

(Testimony of Ralph Parker Ashby.)

seen Mr. Bower that day, yes, but whether we talked fudge, I am not prepared to say.

Q. Yet, to your recollection, it was the same day Mr. Erhart was in your office, January 12th, that you stopped payment of the account, is that right?

A. It was after my conversation with these two gentlemen.

Q. Do you know whether or not it was after you placed this order with Bower-Giebel?

A. Is that the same one?

Q. The same one I just showed you, of January 12th.

A. I don't recall exactly, but I would imagine, if this is dated the same day, I apparently placed this in the morning, and these gentlemen came over a little later on in the day.

Q. Was any of the fudge stored at the pool stockroom for more than 30 days?

A. Do you mean of the original distribution?

Q. That's right.

A. I can't answer that from my own knowledge, because I don't have anything on this item, but I can tell you how our [94] distribution system works.

The Court: He doesn't want that.

Q. By Mr. Rolston: Did you have any conversation with Mr. Bower regarding over-shipment?

A. Yes.

Q. When was that conversation?

A. I don't recall just when that conversation came up. If there was an over-shipment I would not find it out until after all the merchandise was

(Testimony of Ralph Parker Ashby.)

delivered, or the prior order was checked against the receiving records, so in this case it would be some time after December 6th.

Q. Would it be as late as the week between Christmas and New Years?

A. I am not prepared to state when that was. I don't recall when the conversation occurred. I know there was some conversation about it.

Q. Did you have any conversation with him in January regarding fudge that he had not yet picked up on account of over-shipment?

A. I possibly did, yes.

Q. Do you recall which conversation in January it was? A. I don't recall.

(Short recess.)

Q. By Mr. Rolston: Mr. Ashby, during the conversation that you had on or about November 25th that you testified [95] to, you recall that conversation—did you ever tell Mr. Bower during that time that you could not use the fudge; the order was cancelled, and you were cancelling the entire matter?

A. I don't recall making a positive statement of that kind, no.

Q. You did say something concerning fudge; that you were going to cancel the order during that conversation?

A. I don't remember making the specific statement that we would cancel the order, or that we were going to cancel the order.

Q. Did you say anything to that effect?

A. I don't recall saying that. If you have some-

(Testimony of Ralph Parker Ashby.)

thing that may refresh my memory—I may have intimated that, but I don't recall it.

Q. You don't recall that some time during the conversation that you said you could not use the fudge; that you were going to cancel the order?

A. I don't remember making that flat statement, no.

Q. Did you make any statement during the conversation that you could not use the fudge?

A. Only in relation to——

Q. My question is not that confusing, is it?

A. All right. No.

Q. You did not make such a statement? [96]

A. No.

Q. Did you make a statement to this effect to Mr. Bower during the conversation?

A. It was after, in relation to stop-payment.

Q. Do you mean with regard to the stop-payment, was the only thing that you said during that conversation relating to cancelling the order on the fudge; that you could not use the fudge; is that right?

A. I would like to have you repeat that again.

(Question read by the reporter.)

A. That's right.

Q. During that conversation did you say anything concerning whether or not there was mold on any of the fudge; that is, during the conversation of November 25th?

A. I believe I did point that out, that it was beginning to mold.

(Testimony of Ralph Parker Ashby.)

Q. You have a definite recollection of that?

A. That is to the best of my recollection.

Q. You do have a recollection of that?

A. Of stating that the fudge was beginning to mold around the nuts.

Q. You wrote out the requisition orders, such as Defendant's Exhibit D for identification?

A. No, I did not write that.

Q. Did you direct that that be written? [97]

A. This is the direction right here. This is the order for this.

Mr. Rolston: The witness is referring to G for identification. Exhibit D for identification, Mr. Ashby, is the distribution to the stores, is it not?

A. This Exhibit D, this is not the distribution to the stores.

Q. It is not?

A. No. This is the return from the stores. That was created by the individual stores concerned; not by me. I merely have my name there, because I authorized the return for this order.

Q. Exhibit D was the return on November 15th, is that right?

A. I beg your pardon. This was the requisition returned by the warehouse for distribution to the stores. It was not returned by me, however.

Q. Did you instruct this to be written?

A. There is another spread sheet here attached to my purchase order which shows the specific quantities that I ordered to be sent to each store.

(Testimony of Ralph Parker Ashby.)

Q. Does any of the fudge remain in the central warehouse?

A. Only possibly over night or over a week.

Q. A couple of days? [98]

A. Yes. There is no storage, in other words; it doesn't get into storage.

Q. To your knowledge the first returns from the stores was after January 20th, is that correct?

A. The records will show that.

Q. Do you recall the amount of merchandise that you had actually received at the time of your conversation of November 25th?

A. Let me have that again?

(Question read by the reporter.)

A. No, I would not have that. It would be, again, in the records; other than I knew it was in some relation to the 5,000 pounds, because the amount I actually saw with my own eyes; but the records show the exact amounts.

Q. Calling to your attention Defendant's Exhibit H in evidence, your letter of January 20th, to the third paragraph, where you state, relating to November 25th, it says on this date you had received 13,210 pounds.

A. That's right, because when I wrote this letter I had already phoned the warehouse and got the distribution dates, to just merely tie each other up.

Q. At the time of your deposition had you done that?

A. In making the deposition I hadn't; some of my figures were possibly off. I hadn't thought

(Testimony of Ralph Parker Ashby.)

much about the case for a year, and I didn't recall some of the specific [99] amounts involved, because it was all warehouse records anyway.

Q. In your testimony today you still referred to the 5,000 pounds. You hadn't checked the letter since?

A. I hadn't checked the letter as to the exact amount, because I knew all of this was contained in the warehouse records anyway.

Q. Did I understand you to say, Mr. Ashby, that you have not read this letter since?

A. I have read the letter since making the deposition, yes. I still don't remember the specific tonnage.

Mr. Rolston: That is all.

Redirect Examination

By Mr. Wheeler:

Q. During that period of time, Mr. Ashby, what was the volume of transactions that you were conducting with Mr. Bower—during the period from October, 1943, through to January or February, 1944?

A. I don't recall the exact amounts. We were doing in the nature of \$10,000 or so every four weeks. You can get the exact figures from the copies of his invoices which you have. I would say, offhand, in the neighborhood of \$10,000 for a period of four weeks.

Q. What items would be included in that volume?

A. We purchased any bulk candies that Mr.

(Testimony of Ralph Parker Ashby.)

Bower might [100] have available; we purchased national brands of candy bars; cigarettes; and once or twice a few cigars. Quite a few cigars in one particular order. There were some cookies. Well, maybe ten or fifteen kinds of candy bars. In other words, quite a large variety of goods.

Mr. Wheeler: I have no further questions.

Mr. Rolston: There is just one thing I overlooked. I want to offer this stop-payment which the witness has testified concerning into evidence.

Mr. Wheeler: No objection.

The Clerk: Plaintiff's Exhibit 3.

The Court: What is the date of that?

Mr. Wheeler: 1/12/44.

The Court: That is the one referred to in the letter, in the last paragraph?

A. Yes, sir.

The Court: Anything further from this witness?

Mr. Wheeler: Not at this time, your Honor.

The Court: Call your next witness. [101]

VICTOR POCIUS,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Victor Pocius.

Direct Examination

By Mr. Wheeler:

Q. Mr. Pocius, you reside in Chicago, Illinois, do you?
A. Yes, sir.

(Testimony of Victor Pocius.)

Q. What is your business there?

A. Confectionery manufacturing, retail and wholesale.

Q. Do you conduct a business under the name of Karmelkorn Kommissary? A. Yes, sir.

Q. Were you conducting such a business in candy under that name from the period October, 1943, through February, 1944? A. Yes, sir.

Q. Are you a part of the Sears-Roebuck and Company organization? A. No, sir.

Q. Did you receive an order from the Bower-Giebel Company for Pan O' Butter Fudge in October of 1943? A. Yes, sir.

Q. Who acted as your salesman in that transaction?

A. The salesmen were brokers, Mr. Alphonse Erhart and [102] Mr. Bob Mitchell.

Q. Did you send any sample of fudge to Mr. Erhart and Mr. Mitchell? A. Yes, sir.

Q. During the month of October?

A. Mr. Bob Mitchell and Mr. Alphonse Erhart were in Chicago at the time and took a sample with them, I believe.

Q. What were the characteristics of that sample of fudge?

Mr. Rolston: To which we object as too indefinite and ambiguous, and having no materiality at this time.

The Court: I don't know. It relates to the condition of the candy. We have had a discussion of the candy.

(Testimony of Victor Pocius.)

Mr. Wheeler: It is corroborative merely as to the condition of the candy, your Honor.

The Court: Read the question.

(Question read by the reporter.)

The Court: Overruled. I think there was some testimony about making a change, and putting in more nuts. You may answer.

A. Do you mean in what shape was the merchandise?

Q. By Mr. Wheeler: Yes; what kind of fudge was it?

A. It was a cream fudge made with sugar and butter. The ingredients were all on the label just like any other [103] fudge. You have all eaten it.

Q. It had pecans in it, did it? A. Yes.

Q. And it had pecan halves placed on top?

A. Yes.

Q. Was the candy moist or wet at the time it was given to Mr. Erhart and Mr. Mitchell?

Mr. Rolston: I object to that as immaterial, as to what the condition of the sample was at that time.

The Court: Overruled.

A. May I answer?

The Court: Yes.

A. When the fudge was handed to Mr. Alphonse Erhart and Mr. Bob Mitchell it was in good shape.

Q. By Mr. Wheeler: Was it wet?

A. No.

Q. Did it have any accumulation of water around the nuts?

(Testimony of Victor Pocius.)

Mr. Rolston: To which I am going to object as leading his own witness; cross-examining his own witness.

The Court: I will sustain the objection. He is your own witness.

Q. By Mr. Wheeler: You did receive an order from Bower-Giebel Company?

A. Yes, sir. [104]

Q. What was the date on which you gave the sample to Mr. Erhart and Mr. Mitchell?

A. The date of the order?

Q. The date on which you gave the sample to Mr. Erhart and Mr. Mitchell.

A. I couldn't tell you the exact date.

Q. Do you recall the date of the order that you received from Mr. Bower?

A. No, I don't. It was some time in October.

Q. Do you recall the amount of the order?

Mr. Rolston: To which I object as outside the issues, and immaterial, how much fudge was ordered by Bower-Giebel.

The Court: I don't think the amount is in dispute, is it?

Mr. Wheeler: This goes to the testimony of a later letter, the date of a later letter, your Honor. The purpose is to show by this witness, among other things, that there was fudge purchased in addition to that which went to Sears-Roebuck and Company.

The Court: What materiality would that be? We are not concerned with what was purchased

(Testimony of Victor Pocius.)

separately. The main point we are concerned with is whether this fudge was in bad shape when it reached here.

Mr. Wheeler: As a part of the testimony of this witness I intend to show that the fudge which was sent was not of the [105] standard of the sample, and that Mr. Pocius came out here and made a settlement with Mr. Bower, recognizing that the entire amount which was sent was not good candy, so this Sears portion was a part of an entire transaction.

The Court: All right. It may go in, and I will reserve a motion to strike if it is not connected up, because ultimately the fact that he made a settlement would not be material unless it constitutes an admission on the part of Bower, or on their part, that it was defective.

Q. By Mr. Wheeler: Do you recall the amount of the order that you received?

A. There was a written order on that, but the poundage was 100,000 pounds, I believe.

Q. Did you send any other samples to Bower-Giebel Company after this first one, which was given to Mr. Mitchell and Mr. Erhart?

A. There was one by airmail, directly to Bower-Giebel.

Q. Did you examine that sample prior to the time that it was sent? A. Yes, sir.

Q. What was the condition of that sample at the time you examined it?

(Testimony of Victor Pocius.)

A. The same as the first one, only with more nuts on the inside, and more nuts on top.

Q. When did you send that sample? [106]

A. The date I don't remember.

Q. It was subsequent to the first sample?

A. Yes, sir.

Q. Could you fix it with reference to the date of the letter which you wrote with reference to the OPA? Was it prior to that letter?

A. It was after, I believe. I am not positive about that.

Q. The date of that letter is November 13th?

A. Yes. It was after the last sample.

Q. You mean the letter was after the last sample? A. That's right.

Q. Did you, in accordance with the order that you sent to Mr. Bower, send fudge to Los Angeles to the Bower-Giebel Company?

A. That's right.

Q. What was the condition of that fudge with reference to moisture?

A. In Chicago it was perfect.

The Court: May I have the answer?

(Answer read by the reporter.)

Q. By Mr. Wheeler: Was there any candy which was sent which was moist or wet, in Chicago?

A. No, sir.

Q. Did you have any discussion with Mr. Bower concerning [107] the fudge which you sent to California?

Mr. Rolston: To which I am going to object

(Testimony of Victor Pocius.)

unless it is concerning the fudge which is involved here.

Mr. Wheeler: It is subject to the same motion to strike.

The Court: Yes, unless it is shown it is part of the same shipment, or some admission of its condition. Overruled. A motion to strike will be reserved.

A. May I have the question?

(Question read by the reporter.)

A. At what time?

Q. By Mr. Wheeler: At any time.

Q. I believe I had a telephone discussion with Mr. Bower about a week before Christmas, somewhere in that week. I don't recall any other conversation at that time. There might have been.

Q. Do you recall the conversation that you had with him at that time?

A. No, I don't, but I believe that that was the conversation that made up my mind to come here to see Mr. Bower.

The Court: What did it concern?

A. On the distressed merchandise that he had on hand; in relation to that.

Q. By Mr. Wheeler: When you say "distressed merchandise", [108] you are referring to the Pan O' Butter Fudge? A. Yes, sir.

Q. You didn't ship any more?

Mr. Rolston: Mr. Wheeler is practically cross-examining his own witness.

(Testimony of Victor Pocius.)

The Court: No. We know that distressed merchandise has a technical meaning.

Q. By Mr. Wheeler: You came to Los Angeles, then, did you? A. Yes, sir.

Q. Did you have a discussion with Mr. Bower there about the candy? A. Yes, sir.

Q. Where did that discussion take place?

A. At the Bower-Giebel office.

Q. Did you make any examination of candy at the time?

A. Yes, sir, about eight or ten cases.

Q. Where were those boxes of candy stored?

A. In the rear of his office, which was his warehouse.

Q. What was the condition of those eight or ten cases?

Mr. Rolston: To which I am going to object——

Mr. Wheeler: It is all subject to the same objection and motion to strike.

The Court: Overruled.

A. Some of the merchandise was damp, and some of the [109] merchandise was useable and edible.

Q. By Mr. Wheeler: Do you recall whether any part of it had a mold on it at the time?

A. No, sir.

Q. Did you have any conversation with Mr. Bower concerning an adjustment of the price?

A. Yes. That was the first day I talked to him, and I asked him if he wanted me to take this merchandise back, or if he wanted to salvage it at a

(Testimony of Victor Pocius.)

price. He said, "I would like to take it at a price." Those aren't the exact words of our conversation.

The Court: The substance?

A. Yes; and we agreed that the next day we would sit down and figure it out.

Q. By Mr. Wheeler: Did he state any reason to you why he wanted it at a price rather than having you take it back to salvage it?

A. No; our conversation was a long, drawn-out affair.

Q. By the Court: Did he discuss any other shipments that had been made, or any complaints of Sears-Roebuck and others?

A. Yes, he made mention of several companies. Who they were I don't remember, but I think he mentioned Sears.

Q. Did he say the merchandise had been found unsatisfactory by others? [110]

A. At this figure of 20c a pound I would rather have taken it back to Chicago and re-worked it, but he said he had a lot of shipments to take back—from who and where, I don't remember the names, but I don't think he mentioned Sears, but he had to reimburse people; and I bought it at 20c apound.

Q. By the Court: When you shipped it to him it was not with the idea of filling any specific order he had placed with you?

A. I sold directly to Bower-Giebel.

Q. You did not know, for instance, he had a contract to sell 28,000 pounds to Sears, or anybody else?

(Testimony of Victor Pocius.)

A. No, but I did know he sold to Sears. That was mentioned by the brokers at that time.

Q. That was the only shipment? Whatever resale he made was made out of that one shipment of 100,000 pounds? A. That's right.

Q. And they were not earmarked for any customer at all? A. No, sir.

Q. You just sent the merchandise to him on a straight sale? A. That's right.

Q. By Mr. Wheeler: What was the manner in which you made the adjustment?

Mr. Rolton: My objection goes to all of these questions [111] I understand?

Mr. Wheeler: Yes.

A. The adjustment was made on the invoices that he had stopped payment on.

Q. You mean that Mr. Bower had stopped payment on your invoices?

A. Yes, and merchandise also en route.

Q. What was the adjustment that you gave him?

A. On thirty some thousand pounds I took a loss of 30c a pound.

Mr. Rolston: I move to strike "I took a loss."

The Court: Don't say "loss".

A. I deducted 30c a pound on 30,000 pounds.

The Court: What was the original selling price?

A. 50c.

Q. By Mr. Wheeler: Did you make any further reduction or deduction in price?

A. On 7,776 pounds he paid me 32 and a quarter cents a pound.

(Testimony of Victor Pocius.)

Q. Was this candy made for the Los Angeles area with conditions in the Los Angeles area in mind?

A. Yes, we had taken that into consideration.

Q. In what way?

Mr. Rolston: To which we object as immaterial, and outside the issues. [112]

The Court: Yes, I think we are getting away from the issues a great deal. I will sustain the objection.

Q. By Mr. Wheeler: My Pocius, you have been in the candy manufacturing business for some time, have you? A. Yes, sir.

Q. For how long a period should fudge of this kind keep?

A. It all depends on the weather and conditions surrounding it. In certain climates it can stay six months; in certain climates it will spoil in any length of time.

Q. Would you explain that answer further, as to what type of weather affects candy?

A. Moisture; humidity.

Q. In other words, it won't stand up as well?

A. That's right.

Mr. Wheeler: I have no further questions.

Q. By the Court: They are sent out in air-tight containers, are they not?

A. Yes.

Q. And then they are kept in a dry warehouse?

A. Pardon me; I will explain how these were packed. 9-pound fudge was packed in individual

(Testimony of Victor Pocius.)

containers with a top and bottom lid in which are liners, and then two of these containers were put in one cargo container 14 by 14, by four [113] and a half inches high.

Q. Made of cardboard? A. Yes.

Q. Assuming that they were not opened, but were placed in a dry warehouse in that period of the year, November and December, how would the atmospheric conditions affect it?

A. We naturally cook it for California. You have a little moisture in it, because of the dryness of it, and naturally, when it was put in a warm or heated store it would be suitable for sale.

Q. Assuming you have got that margin of safety or tolerance, or whatever you call it in your manufacturing? A. Yes.

Q. It had a little tolerance. Suppose it were kept in a dry warehouse, and not opened, and not on the shelf more than a day, how should it stand up under those conditions?

A. It would stand up all right, but here we had a condition on the way, which we don't have in our own vicinity, of anywhere from six to thirteen days shipment.

Q. It was rather a long shipment, is that the idea? A. Yes.

Q. You think that long period of shipment may have accounted for it, is that right?

A. It might have been that. We don't know.

Q. But you were satisfied, when you got here,

(Testimony of Victor Pocius.)

from the [114] sample that something was wrong with the merchandise, weren't you?

A. Yes. Some was good and some was bad.

Cross Examination

By Mr. Rolston:

Q. It is a fact, is it not, that Mr. Bower cancelled his order prior to this adjustment?

A. He cancelled his order, to my recollection, by stopping payment on his checks.

Q. Didn't he wire you and stop payment of the order?

A. That I don't recall at this time. He might have. If there was any such papers they would be the proof of it.

Q. Mr. Pocius, you still do business with Sears-Roebuck, do you not? A. Yes, sir.

Q. You have outlets in all their stores around Chicago and that area?

A. No, I don't have any concession.

Q. A great many stores?

A. No; I sell a few of their stores in Chicago, but not all of them.

Q. Is your volume with Sears back in that territory as high as \$1,000 a day? A. No, sir.

Q. Is it close to that figure? A. No, sir.

Q. That is, of volume, I mean?

A. Yes, sir.

Q. Are you going to be leaving Los Angeles soon? A. Tomorrow, at 12.

Q. When did you get in to Los Angeles?

A. Yesterday at 9:15 in the morning.

(Testimony of Victor Pocius.)

Q. Is Sears-Roebuck paying your expenses on this trip? A. That has not been discussed.

Q. Were some of the shipments that you made adjustment on shipped after you received a stop-order by wire? A. Yes, sir.

Q. That was one of the considerations of the settlement with Bower? A. That's right.

Q. A further consideration was that the shipments were arriving too late for the Christmas trade?

A. No, because he said he sent his order to stop or to cancel his checks, and we had a conversation to the effect that he did not want any more fudge.

Q. It was too late in the year?

A. No, there was no discussion of the weather at the time.

Q. I say the season; not the weather. [116]

A. No.

Q. It is your definite recollection at the time of the adjustment there was no discussion with Sears whatsoever concerning the Sears merchandise whatsoever? A. No.

Q. You adjusted each invoice, invoice by invoice, is that right? A. No, sir.

Q. That is not right?

A. I adjusted each invoice per invoice, yes, but there is an explanation for that.

The Court: You have a right to give it.

A. The merchandise he had in stock, we didn't take invoice per invoice, and check invoice per case, or the amount of stock he had against each invoice.

(Testimony of Victor Pocius.)

We took the whole total of invoices, and he paid me at the rate of 20c per pound.

Q. By Mr. Rolston: That was done invoice by invoice, was it not?

A. Yes, upon invoice per invoice, upon the unpaid invoices.

Q. The invoices, then, were not due?

A. They were due; otherwise he would not have the invoices.

The Court: He did not take back any of the merchandise at all? [117] A. No, sir.

Q. Do you remember how much was shipped on this shipment? A. 83,000 pounds.

Q. 83,000 pounds of a maximum of 100,000 pounds? A. Yes.

Mr. Rolston: At this time, your Honor, I would like to strike all the testimony concerning the adjustment as having no materiality in this case, and is no evidence one way or the other.

The Court: I will deny the motion. When a manufacturer himself comes out here, at the request of the agent who made the resale, and admits that the merchandise was not in a merchantable condition, and makes an adjustment, it is corroborative of the fact that the candy was not in a merchantable condition.

Mr. Rolston: There is no evidence that it was merchantable at the time it was shipped.

The Court: We will argue that later on. Evidently he thought he was responsible.

Q. The adjustment was made upon the entire

(Testimony of Victor Pocius.)

shipment, of which Sears' merchandise was a part? The adjustment was made on the 83,000 pounds, isn't that correct?

A. No; the total merchandise shipped was 83,000.

Q. What was the adjustment made on? [118]

A. 38,000 pounds.

Mr. Rolston: I want to go into something else.

The Witness: That is the number of unpaid invoices he had, and we naturally took those to establish our credit to himself and his customers.

Q. By Mr. Rolston: Mr. Pocius, I show you a document which purports to be an invoice of the Karmelkorn Kommissary, No. 1067, under date of 12/15/43, addressed to Bower-Giebel Wholesale Company. Is that one of the invoices covering this merchandise? A. I presume it is.

Q. That is on your stationery?

A. That's right; it is on my stationery.

Q. You saw that on or about December 30th at the Bower-Giebel Wholesale Company, did you not? A. Yes, I probably did.

Q. I show you a check of Bower-Giebel Wholesale Co., check No. 4052, dated December 30, 1943, and ask you if that is the check in payment of that invoice? A. Yes, sir.

Q. I see the invoice bears certain figures in handwriting. Were those figures placed there in your presence? A. Yes, they were.

Q. The final price of the invoice is \$791.67, is that right? [119] A. Yes, sir.

Q. That was the amount that you and Mr. Bower

(Testimony of Victor Pocius.)

arrived on, as payment for the 5,868 pounds of Pan O' Butter Fudge represented by that invoice?

A. That's right.

Q. So this check pays for this invoice?

A. Yes.

Q. There were no other considerations except the merchandise represented by this invoice?

A. You misunderstood. We can go through all the invoices, and deduct along the same lines. You don't understand our idea, when we did that.

The Court: You had better explain that. There is confusion in counsel's mind and mine, too.

A. I went into Bower-Giebel's. He had all his fudge sitting around the room, and we took the invoices, and counted out case for case. Whether he had his case right on the floor, I don't know; but we reduced it to 20c a pound.

The Court: Instead of 50?

A. Yes.

Q. You arbitrarily cut down the price paid to 20c a pound.

A. Yes, except what was en route.

Q. What was en route?

A. I paid 32 and a quarter a pound. [120]

Q. That settlement you made brought down to date on the entire shipment?

A. That's right.

Q. On both the amount paid for, and that which was unpaid?

A. That's right. If he had paid me on each

(Testimony of Victor Pocius.)

individual invoice, then we would have counted case for case.

Q. In other words, you would have to have a proportionate reduction on each invoice?

A. That's right.

The Court: That is what I thought. I don't think the adjustment is so important, but rather the fact that the manufacturer admitted there was defective merchandise in every shipment.

Mr. Rolston: That was not the basic reason for the adjustment.

The Court: That is a matter of argument. There is evidence that other merchandise was up to what it should have been. You will have your opportunity to rebut that testimony to show that it was all right, and to show that your adjustment was on other grounds. I merely have to rule upon the materiality of the evidence. I don't have to decide this case now; and certainly it is material when he comes out here and admits he was satisfied that the merchandise [121] was not merchantable, or a good portion of it. He was the manufacturer, and Bower-Giebel were his agents in the resale.

Mr. Rolston: They weren't agents.

The Court: They purchased from him.

Q. By Mr. Rolston: During the months of October, November and December, 1943, you were at that time doing business with Sears, Roebuck and Company direct, were you not, in Chicago?

A. Yes.

(Testimony of Victor Pocius.)

Q. And have been ever since that time, is that right?

A. Yes. We laid off in interval periods.

The Court: You never, however, sent a direct shipment to any of their stores upon an order direct, except this one to Bower-Giebel, is that correct?

A. Until December 2, 1944.

Q. I mean prior to this order. A. No.

Q. You had not sent anything direct to their warehouse, or to the main store here, or to any of the branches?

A. No, sir.

Q. By Mr. Rolston: Do I understand at the present time you are selling Sears, Roebuck direct?

A. That is right.

Q. You have been shipping them in the past 30 days or more? [122]

A. One shipment, December 2, 1944.

Mr. Rolston: I want to reserve the right to recall the witness under 2055.

The Court: It is only 4 o'clock. We don't quit until 5.

Mr. Rolston: In order to properly introduce the evidence, then, your Honor, I want to go through the invoices and show that each payment was made by each invoice. The witness has already testified concerning Bower's check No. 4056, and the invoice 1067 which paid for it.

The Court: All right. I think probably you can stipulate that was a fact, subject to his explanation. You can go ahead and put them all in without taking the time to go through them, because you will

(Testimony of Victor Pocius.)

show each check corresponds to the corresponding invoice.

Mr. Wheeler: I have copies from Mr. Pocius.

The Court: Put them all in, and give each a number, so the clerk will identify it. No further foundation is necessary. Counsel do not insist on a further foundation.

The Clerk: This will be marked 4 in evidence.

The Court: You can put them in as one exhibit, and mark them A, B, C and D, along the line, and they will show for themselves.

Mr. Rolston: Do you mean they will be 4-A, 4-B, and so forth? [123]

The Court: Yes.

Mr. Rolston: There is no use of cluttering up the record with the bills of lading. The check and invoice will be all right.

The Court: Invoice No. 1035 will be 4-B.

Mr. Rolston: Invoice 1036; check No. 4040.

The Clerk: 4-C.

Mr. Rolston: Invoice No. 1038; check 4039.

The Clerk: 4-D.

Mr. Rolston: Invoice 1039; check 4042.

The Clerk: 4-E.

Mr. Rolston: Invoice 1044; check 4043.

The Clerk: 4-F.

Mr. Rolston: Invoice 1059; check No. 4049.

The Clerk: 4-G.

Mr. Rolston: Invoice No. 1061; check No. 4050.

The Clerk: 4-H.

(Testimony of Victor Pocius.)

Mr. Rolston: Invoice No. 1064; covered by check 4051.

The Clerk: 4-I.

Mr. Rolston: May I have 4-I? Mr. Pocius, I show you Exhibit 4-I, and which is invoice No. 1064 in the amount of \$855.00. Is that the correct billing price? A. Yes, sir.

Q. There was no adjustment made on that invoice, was there? [124]

A. No, sir.

Q. In other words, that invoice was paid in full?

A. That's right.

Q. By check No. 4051, which is attached to it?

A. That's right.

Q. That was also given to you on December 30th, at the time of the adjustment, is that right?

A. That's right.

Q. That invoice was also unpaid at that time, is that right? A. Evidently it was.

Q. In other words, your statement made previously that all unpaid bills were discounted if unpaid is not exactly right, is that correct?

A. That's right.

Mr. Rolston: Invoice 1073; check No. 4062. Next in order.

The Clerk: 4-J.

Mr. Rolston: Invoice No. 1075; check No. 4063.

The Clerk: 4-K.

Mr. Rolston: Invoice No. 1034; check 4037.

The Clerk: 4-L.

Mr. Rolston: Invoice No. 1033; check No. 4037.

(Testimony of Victor Pocius.)

The Clerk: 4-M.

Q. Mr. Pocius, each shipment that was made to the Bower-Giebel [125] Wholesale Company was sampled by Mr. Mitchell during your presence in Chicago, is that right?

A. That is, when I was in Chicago, yes.

Q. Did he show you these samples?

A. When I was there, he did.

Q. All the samples that you saw were in the same condition, and of the same standard as the sample which had previously been shipped out to Bower-Giebel, is that correct?

A. That is correct.

Q. And made in the same manner?

A. All alike. That is, to the best of human possibility, of holding within a degree or two.

Q. In other words, as far as you observed, all shipments were up to and equal to the sample?

A. That's right.

Q. When you saw the merchandise at the Bower-Giebel Wholesale warehouse do you know how long it had been there?

A. No, sir.

Q. Do you know under what conditions it had been stored?

A. No, sir.

Q. After it was received by them?

A. By Bower-Giebel?

Q. Yes. A. No. [126]

Q. Do you know how they were shipped?

A. By what truck line?

Q. Yes. A. By the Ringsby Motors.

(Testimony of Victor Pocius.)

Q. Were they instructed to be shipped in refrigerated cars?

A. I believe that was on the bill of lading. I won't say specifically.

Q. Do you know whether or not they were shipped in refrigerated cars?

A. That I don't know.

Q. Did the cases each have labels on them showing how the goods had been packed or shipped?

A. Yes, they had an instruction on there.

Q. Do you recall what that instruction was?

A. I believe it was on the side of the case. It said not to stack four or seven high; I don't know which.

The Court: That was to prevent breakage of the cartons, is that correct? A. That's right.

Q. By Mr. Rolston: Is it not a fact, Mr. Pocius, that the extra weight would also have a tendency to squeeze the moisture out of the fudge?

A. Yes, sir.

Q. That was one of the reasons why it should not be [127] packed more than four high or seven high, whichever it was? A. That's right.

Q. So that possibly was one of the elements that may have caused this fudge to be moist at Mr. Bower's, might it not,—the fact they were stacked too high after they were received, is that right?

A. Definitely.

Q. Where they were stored after they were received? A. That's right.

(Testimony of Victor Pocius.)

Q. And whether or not they had been opened, and how long they had remained open, is that right?

A. Yes, sir.

Q. Also the weather conditions existing in Los Angeles; whether or not the humidity was up or down; that might affect it? A. That's right.

Q. Whether or not it was damp or dry would also affect it? A. Yes, sir.

Q. All those elements and factors enter into whether the fudge will remain in perfect condition or become moist, or in another case, dry?

A. That's right.

Q. You have no knowledge of your own how Sears, Roebuck handled the fudge out here? [128]

A. No, sir.

Mr. Rolston: That is all at this time, your Honor.

Mr. Wheeler: I have no further questions. May the witness be excused?

The Court: Just one more question: Mr. Bower, in asking for the adjustment, complained about the quality of the merchandise, didn't he?

A. Yes.

Mr. Rolston: To which I will object, if I may register my objection.

The Court: You may object to any questions I ask. I want to get back to the idea that he did not give 30c for nothing. He complained of the quality of the merchandise? A. Yes.

Q. It showed dampness? A. Yes.

(Testimony of Victor Pocius.)

Q. You made the adjustment, because you thought the complaint was legitimate?

A. Yes.

Q. You did not cut 30c out of the 50c just to be friends with him, did you? A. No, sir.

Mr. Rolston: May it be understood that my objection goes to the court's questions?

The Court: Certainly. I wanted to go back to see [129] what this man paid 30c a pound for. I am through.

Q. By Mr. Rolston: Isn't it a fact, Mr. Pocius, that Mr. Bower asked for authority to return the merchandise, and also that the goods en route would be returned? A. Yes, sir.

Q. He asked you?

A. No, he did not. He asked it in a wire. I think in his wire, or he had a letter to that effect.

Q. He asked you to take back the merchandise, is that correct? A. Yes, sir.

Q. You did not want to take back the merchandise, did you? A. No, I did not say that.

The Court: On the contrary, he said he offered to take it back.

A. There is a witness to the effect of what happened; Mr. Bob Mitchell.

Q. When you got here you offered to take it back?

A. Yes, I asked him "Do you want me to take it back, or do you want to salvage it?"

Q. Then you agreed on this basis?

A. Then he told me he had more merchandise

(Testimony of Victor Pocius.)

outstanding, so at 20c a pound which was the price he quoted, he said his customers and himself could make out. [130]

Q. By Mr. Rolston: Mr. Pocius, I show you a copy of a telegram from Los Angeles, dated December 21, 1943, addressed to Karmelkorn Kommissary. Did you receive the original of that?

A. Yes, sir.

Q. Will you read it?

A. "Telegraph or write your written authority to return fudge in harmony with your verbal authority yesterday."

Q. At the time of this telegram Mr. Bower had offered to return the fudge, had he not?

A. Yes, no doubt he had.

Q. Did you not want the fudge back at that time, is that right?

A. No, I wanted it back at that price.

Q. Did you wire him to return the fudge?

A. No, I didn't. As part of our conversation, I was coming out here.

Mr. Rolston: I will ask that this telegram be introduced in evidence.

The Court: It may be received.

The Clerk: Plaintiff's 5.

Q. By Mr. Rolston: So that prior to your coming out to California in 1943, in December, Mr. Bower had offered to return all of the merchandise he had on hand, is that right?

A. Prior to that, yes. [131]

Mr. Rolston: That is all.

The Court: Just a minute. I want to look at this telegram. All right.

Mr. Wheeler: I have no further questions.

The Court: Call your next witness.

Mr. Wheeler: Mr. Erhart.

ALPHONSE ERHART,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Alphonse Erhart.

Direct Examination

By Mr. Wheeler:

Q. Mr. Erhart, you are a resident of Los Angeles, are you?

A. At the present time, yes.

Q. You are a broker in the candy business?

A. Candy and food, yes, sir.

Q. How long have you been a broker in the candy and food business? A. 15 years.

Q. I call your attention to Pan O' Butter Fudge, and particularly to the month of October, 1943. I will ask you [132] if you called at the office of the Bower-Giebel Company, in the City of Los Angeles, during the latter part of October, 1943?

A. Yes.

Q. Did you call with reference to Pan O' Butter Fudge? A. Yes.

Q. Did you have a sample of the Pan O' Butter Fudge with you at that time? A. Yes.

Q. Did you meet Mr. Ashby, of Sears, Roebuck

(Testimony of Alphonse Erhart.)

and Company, at the office of Mr. Bower, on the occasion of your visit?

A. For the first time, yes.

Q. How long had you been at Mr. Bower's office before you met Mr. Ashby?

A. About an hour.

Q. Did you have any conversation with Mr. Ashby at the time?

A. Very little. My conversation, along with Mr. Mitchell, was with Mr. Bower with regard to the fudge. There was very little conversation after Mr. Ashby arrived, which went on between Mr. Mitchell, myself and Mr. Ashby. The conversation was between Mr. Ashby and Mr. Bower, as he was Mr. Bower's customer, and not our customer.

Q. You were present during the conversation between Mr. [133] Bower and Mr. Ashby?

A. Yes.

Q. Will you relate the conversation that occurred at that time?

A. Between Mr. Ashby and Mr. Bower?

Q. Yes.

A. Well, to the best of my knowledge, Mr. Bower called Mr. Ashby and mentioned the fact that he had a chance to get a good quantity of fudge. He thought it was pretty good. Mr. Ashby was interested, and he must have said yes, and said he would be over. Mr. Bower hung up and said, "Mr. Ashby will be over shortly, gentlemen." I think Mitchell and myself walked around and had a smoke or something until Mr. Ashby arrived. When

(Testimony of Alphonse Erhart.)

he arrived he went to Mr. Bower's desk and Mr. Bower and Mr. Ashby at that time went over the fudge sample very thoroughly. They went back and forth about the price and quality, and there was some discussion with regard to the OPA by Mr. Ashby or Mr. Bower, and Mr. Bower turned to myself and my associate, and it went along, the the result of the conversation, and the examination of the sample, was that Mr. Ashby gave Mr. Bower a purchase order in the amount of 28,000 pounds of fudge.

Q. Do you recall whether the fudge was cut at that time?

A. Yes, it had been cut previous to Mr. Ashby's arrival, by Mr. Bower, and sampled, in the little office there, and also it was cut after Mr. Ashby arrived, and he sampled it.

Q. What was the appearance of the sample at that time?

A. To my mind it was in excellent condition.

Q. Do you recall any further conversation with reference to more nuts in the candy, or on the candy?

A. Yes, Mr. Ashby suggested making a change in the fudge to the extent of putting more and larger nuts on top, and we had been placing some broken pecans in the mixture, not in chopped nut form, but large broken ones, and he suggested it would be better if we would add more and have them chopped and finer. He made that suggestion; Mr. Bower turned to us and wanted to know could

(Testimony of Alphonse Erhart.)

we get it done. We felt pretty sure, and said yes, and it subsequently was done.

Q. Was a second sample sent by Karmelkorn Kommissarly to Mr. Bower?

A. Yes, it was sent while Mr. Mitchell and I were in Chicago.

Q. Did you examine that sample?

A. In Chicago?

A. No, Mr. Mitchell did.

Q. You don't recall seeing it?

A. No. Mr. Mitchell remarked to me, so did Mr. Pocius, that the sample had been sent by air express. [135]

Q. Did you have any further conversation with Mr. Ashby after this meeting? Did you have any further conversation with Mr. Bower on or about November 25th?

A. I had a further conversation with Mr. Bower the same day, after Mr. Ashby left.

Q. Yes.

A. Are you passing that over, or going forward to another time?

Q. Yes.

Mr. Rolston: What was the question?

Mr. Wheeler: As to whether he had a conversation with Mr. Bower on or about November 25th.

A. The latter part of November I received a call at my office to call Mr. Bower. I called him back as soon as I received the message. He asked me to come to his office at that time. I did; I came to his office, and he asked me——

(Testimony of Alphonse Erhart.)

Mr. Rolston: Just a minute. You have not been asked for the conversation.

Q. By Mr. Wheeler: Did you have a conversation with Mr. Bower at that time? A. Yes.

Q. What was the conversation?

Mr. Rolston: To which I will object as immaterial, and outside of the issues. [136]

Mr. Wheeler: I am not particularly interested in it other than this:

Q. Did he ask you at that time to go over to Sears, Roebuck and Company? A. Yes.

Q. Your answer was? A. He did ask, yes.

Q. Did you go over to Sears, Roebuck and Company? A. I did.

Q. What occurred while you were at Sears, Roebuck and Company?

A. In stating this, may I say this as it occurred?

The Court: So far as you don't wander too far afield.

A. When I walked into Mr. Ashby's office——

The Court: I notice Mr. Rolston has not objected.

A. As I walked into Mr. Ashby's office, the first thing I noticed, on the lefthand side as I was going in the door, was a table on which there was a considerable — I would say 60 or 90 pounds of fudge, packed up in a manner which was not very attractive, either as to the piling, or the quality. It looked rather bad. I said how do you do to Mr. Ashby. He said, "I have a little difficulty with the fudge, Mr. Erhart. I don't know what to make of

(Testimony of Alphonse Erhart.)

it; it is so moist; I don't know what to make of it." I said, "The way this has been handled, it is hard for me to make an inspection [137] either for Bower-Giebel or for Karmelkorn, and be fair." He said, "Let us go in the stockroom", which was some distance away. We went into the stockroom, and they took apart three or four boxes, cartons, and Mr. Ashby said, "Each box has two or three inner cartons in which there is a slab of fudge." That slab was wrapped thoroughly with waxed paper. We finally came back into his office, and after working back and forth on what could be done with it, I merely made a recommendation, which Mr. Ashby approved, to the effect that I felt that the sweating of the fudge was due to the high altitude and warmer climate, and had caused moisture to the fudge which would dry out if it was allowed to take the waxed paper off of the part to be used the next day, and take the waxed paper, and spread it over each individual carton, and further leaving the fudge exposed either in the stockroom over night, or at the selling counter downstairs, so that the air could dry the slight moisture. It was moisture, like in taffy. It was a good fudge, except that it was moist. I made that recommendation to Ashby. He signified he would try it on that basis. He said, "That seems logical. We will try it." I turned and said, "Inasmuch as you have destroyed here, or made unsalable, a matter of 60 or 80 pounds, I will make a recommendation to Karmelkorn to give you a replacement. I can only recommend that, but my

(Testimony of Alphonse Erhart.)

firms as a rule do not reject my recommendation.” At the same time [138] Mr. Ashby wrote a replacement request. He did not ask me to sign it. I purposely avoided signing it, because I was in no position to, because we had not sold Sears, Roebuck; that was the way I felt, so I evaded that.

The Court: Nobody is criticizing your action.

A. I was very much interested. I did not commit myself or Karmelkorn. I was in no position to make any commitment, and Mr. Ashby did not make an issue of it one way or the other. I went back and reported it exactly to Mr. Bower. Mr. Bower thanked me for it. I heard nothing further about any trouble with Sears, Roebuck until I returned from the north, after Christmas. It was at that time my associate, Mr. Mitchell, told me we had better go down and see Mr. Bower; that there was some more trouble at Sears, Roebuck.

Q. By Mr. Wheeler: You did go down and see Mr. Bower?

A. Mr. Mitchell and I both went down at that time.

Q. Did Mr. Bower at that time ask you to go to Sears, Roebuck and Company? A. Yes.

Q. Do you recall the date?

A. It was early in January.

Q. Can you fix it more definitely than that?

A. I would say it was before the 15th, because I left [139] for Seattle the day after Christmas, and I returned, I would say, around the 10th or 15th; somewhere in there.

(Testimony of Alphonse Erhart.)

Q. What happened at Sears, Roebuck and Company on the occasion of this second visit?

A. Well, we went to see Mr. Ashby. He took Mr. Mitchell and I back to the storeroom, and there we opened a matter of 10 or 15 cases of fudge; the complete cases and the inner cartons. Do you want me to continue?

Q. Yes.

A. We opened them up. Some were moldy around the nuts; others were dried out, and when fudge dries out it sort of becomes very white-looking, like chalk, as someone previously remarked, and said if you just dropped it on the floor, it would not break. Amongst it, though, we found one or two slabs of fudge which could be used, which were in fair condition. There was no use denying that the fudge at this time was unsaleable, either from the fact that it was moldy or moist, or dried out. The moldiness came from the moisture around the nuts. Some had become a little more sweaty than others, and had discolored the carton, and some went right through the inner and outer carton. We saw it, and I imagine I must have made some remarks that there was no use of anyone talking to a man like Mr. Ashby, who had been, a professional buyer——

Mr. Rolston: No—— [140]

The Court: Tell us what you said.

A. I just said the fudge was bad; the majority of it.

Q. By Mr. Wheeler: Do you recall a conversa-

(Testimony of Alphonse Erhart.)

tion to the effect that some times you would question a customer, but in this case there was no question about the condition of the fudge?

A. I no doubt referred that there was no question about the condition of the fudge. I do recall saying that I admitted the fudge was bad, that the biggest part of the fudge was in bad shape.

Q. You then went back and reported to Mr. Bower, did you?

A. Yes, Mr. Mitchell and I went back there and reported to Mr. Bower. Then he said, "Thank you, gentlemen. I will handle it from now on." Mr. Mitchell and I heard nothing about it until we were notified eventually that it would come to court.

Mr. Wheeler: No further questions.

Cross Examination

By Mr. Rolston:

Q. Mr. Erhart, at the time that you saw Mr. Ashby, in the latter part of November, is it not a fact that you told him that this 90 pounds was a final adjustment?

A. I may have made that clear at the time; I did make it clear, I believe, that it was a final adjustment by me. [141] That was my intention.

Q. At the time you saw Mr. Ashby, at that time he said, "We can't use that fudge. We stopped payment on our invoice to Bower. We are going to cancel the order", did he not?

A. He did not say to me that. I assume he had

(Testimony of Alphonse Erhart.)

previously stated that, or we would not have been over there.

Q. When you left, was there any statement made during the conversation by you, "Use it as much as you can and I will adjust it later on"?

A. I do not recall that.

Q. Did you make any statement to that effect?

A. Did I?

Q. Yes.

A. Of course not.

Q. As a matter of fact, before you went to the stockroom did not Mr. Ashby say something to the effect that the girls didn't like to cut this fudge, and he was having a lot of trouble moving it?

A. Yes, he remarked that the fudge was hard to handle; to cut the fudge and handle it, was hard.

Q. Didn't he lay a portion of the blame upon the fact that he had new help, green girls, who did not like to get their hands messy?

A. Everyone knows they have green help at Christmas. [142]

The Court: That was not the question.

A. I don't recall distinctly the conversation. It seems familiar. I recall his remarking he hoped it dried off better, because the girls did kick about handling it from being sticky; but we recommended leaving it dry off, and finally that would be overcome.

Q. By Mr. Rolston. As a matter of fact, at the time of the original sale, back in October, around

(Testimony of Alphonse Erhart.)

the 20th, when Mr. Ashby ordered the fudge, didn't it stick to the knife?

A. It all depends upon the way you cut it. I recall stating that the knife should be moistened once in a while in cutting fudge; everyone does, in cutting a large block of fudge, an inch and a half thick, otherwise it will stick. He was cutting it with a penknife, so it stuck to the penknife.

Q. Did you see any fudge manufactured in Chicago during November?

A. You mean manufactured for Mr. Bower?

Q. Yes.

A. I did not see it. Mr. Mitchell was there for that purpose.

Q. Did you see the sample expressed out?

A. No.

Q. You did not see any merchandise at any time? [143]

A. No, because we had made arrangements, and Mitchell was to be there for that very purpose.

Q. You were in Chicago, and you did not check it?

A. I was in and out of Chicago. Mitchell was there all the time.

Q. As a matter of fact, when you came into Mr. Ashby's office some time in the early part of January Ashby's first statement was to the effect "Well, I am having trouble with the fudge again", is that right?

A. Something of the general order.

Q. Didn't you, during that conversation, say,

(Testimony of Alphonse Erhart.)

“Mr. Ashby, it looks as if you over bought a little, and are trying to crawl out of the deal”?

A. I am afraid I did not say that, because that would be rather rude to say to a buyer as powerful and big as Sears, Roebuck. What I thought might be another matter, but I am quite certain I did not say that when I went into the stockroom.

Q. Did any of the cases appear to have been opened?

A. There were one or two there open.

Q. One or two?

A. As we walked in there was a bench, and one or two were lying on the bench; others were nicely stacked; some on the bench and some up on the wall.

Q. How high were they stacked? [144]

A. None was stacked any too high. That was one thing Mr. Mitchell and I watched about.

Q. Were you in the Soto Street warehouse at that time?

A. In the large Sears, Roebuck building, on East Olympic, and the warehouse that they have is about 100, maybe 150 feet, and Mr. Ashby's office is on the same floor, in the middle of the building.

Q. Did you happen to notice any odor of fur or moths at that time? A. No.

Q. Isn't it a fact on that January occasion you actually opened about five or six cases: not ten or fifteen?

(Testimony of Alphonse Erhart.)

A. Say five to ten. I think we opened more than five, because we opened quite a few on one side, and then we went around to the other side. We did find a few cases that had a few good slabs.

Q. Isn't it a fact that quite a bit was saleable; not prime merchandise?

A. I think 70 or 75 per cent that we looked at was not; there was about 25 per cent that was good; I mean could be sold at a good price.

Q. You were up to my office in Hollywood, were you not? A. That's right.

Q. That was about four months ago?

A. Was it? [145]

Q. About that. September or October of last year. A. Yes.

Q. Isn't it a fact at that time that you told me you opened five or six cases, and some were dry, but not as dry as others, but still saleable; but not as prime merchandise; that it must be cleared out in a hurry, or there would be a terrific loss? That was said during the conference in the early part of January?

Q. It is possible, because it was my impression that the sale of the merchandise must be immediately, to overcome any further loss.

Q. At that time you told me some of the merchandise was still saleable?

A. I don't recall. You must be mistaken on that, because the facts are in fact the other way.

Q. Did you tell me at that time that you told Mr. Ashby that during the conference that you

(Testimony of Alphonse Erhart.)

intimated to Mr. Ashby that he had over bought his product, and this merchandise was still saleable?

A. Did I tell you that? Did I give you that impression?

Q. That's right.

A. I doubt if I told Mr. Ashby that. I may have told you, and gave you that impression.

Q. You did not tell me that you told Mr. Ashby that? [146]

A. No.

The Court: That isn't important. In other words, it is one thing for you to have told Mr. Ashby, when he was complaining about the merchandise, that he may have over bought, and another thing that you may have thought he over bought. What you thought is not important.

A. I don't recall telling him that. I seriously question that I ever told Mr. Ashby in person that.

The Court: But you admit your conclusion at that examination that probably 70 per cent of the merchandise was not merchantable any longer?

A. That is my opinion.

Q. By Mr. Rolston: You don't know how that merchandise was stored during that period of time?

A. No, only what I observed at the time. I don't believe anywhere near all of the merchandise could have been in that stockroom.

Q. How many cases were there?

A. I would say maybe 100 cases, guessing at it.

(Testimony of Alphonse Erhart.)

The Court: What would the average case weigh?

A. I think they were 9-pound slabs. It would be where we could see it. We could see possibly two to three thousand pounds. We gave it a pretty thorough inspection. I judge, from the way it ran there, that the rest of the merchandise might run about the same. [147]

Q. By Mr. Rolston: As a matter of fact there are only two slabs to a case, are there not?

A. We are now packing them three; so I imagine at that time there were two, probably.

Q. There were two at that time?

A. I can't remember distinctly. There were two large wide ones. We are making them less wide now.

Q. Coming back to the discussion in my office, isn't it a fact that I asked you at that time, and read from a letter of Mr. Ashby's, and I asked you words to this effect: "Mr. Erhart, did you say at that time: 'Mr. Ashby, in most cases I will argue with the buyer, but here the buyer has a real kick coming'"; and at that time you denied you said anything of that nature?

A. I still deny it.

Q. Isn't it true I asked you at that time whether or not Mr. Mitchell said, "I would not have believed it possible if I had not seen it with my own eyes", and at that time you said Mitchell had not said anything like that?

A. I don't recall saying so.

(Testimony of Alphonse Erhart.)

Q. On that occasion, in my office, I asked you whether or not you made the following statement: "Bower will have to see this, because he will have to stand at least part of the loss"? And you said to me at that time. "I said no such thing"? [148]

A. I recall stating to Mr. Ashby, in the presence of Mr. Mitchell, that Mr. Bower would have to see this. I don't recall stating anything about Bower having to stand part of the loss. I could gain nothing by getting my neck in a sling, and making that remark.

Mr. Wheeler: Your observation was limited to the condition in which you found the merchandise; not who should stand the loss?

A. That is a fact. I was protecting Alphonse's skin then.

Q. By Mr. Rolston: And you are still doing it now? A. Yes, the best I can.

Mr. Rolston: Nothing further.

(Whereupon an adjournment was taken until 10 o'clock a.m. of the following day, Wednesday, January 10, 1945.) [149]

Los Angeles, California,

Wednesday, January 10, 1945, 10 a. m.

MARIE V. PELSTER,

called as a witness on behalf of the defendant,
being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Marie V. Pelster.

Direct Examination

By Mr. Wheeler:

Q. Mrs. Pelster, you are a resident of Los Angeles, are you? A. Yes, sir, I am.

Q. You have been for some years?

A. Yes.

Q. During the period from October, 1943 through February, 1944 what was your employment?

A. I was the division head of the 9th Street store.

Q. Division head of what department?

A. The candy department of the 9th Street store.

Q. How long had you been in the candy department in the 9th Street store?

A. From the 8th of May, 1943.

Q. Of 1943? A. Yes.

Q. Had you had any prior experience? [150]

A. In the candy department?

Q. In the candy department? A. No, sir.

(Testimony of Marie V. Pelster.)

Q. You are no longer employed by Sears, Roebuck and Company? A. No, sir.

Q. As a matter of fact, you are taking care of a baby, is that correct? A. Yes, sir.

Q. Calling your attention to fudge known as Pan O' Butter Fudge, do you recall having that candy in your division? A. Yes, sir.

Q. During that period of time?

A. Yes, sir.

Mr. Wheeler: I will mark this for identification.

The Clerk: Defendant's Exhibit I for identification. What is this?

Mr. Wheeler: It is a retail requisition, dated 11/15/43, No. 130341. I next offer for identification retail requisition, Return Merchandise. It is dated January 22, 1944, No. 273997.

The Clerk: J for identification.

Mr. Wheeler: And the next one is a mark-down form dated 1/6/44. No. 300839. [151]

The Clerk: K for identification.

Q. By Mr. Wheeler: Showing you Defendant's Exhibit I for identification, I will ask you if you recognize that exhibit. A. Yes, sir, I do.

Q. What is it, Mrs. Pelster?

A. What do you mean? It's pecan chocolate fudge. Is that what you mean?

Q. Yes. Does it show the quantity of fudge received by you at your store? A. Yes, sir.

Q. What was the quantity?

A. 5328 pounds.

(Testimony of Marie V. Pelster.)

Q. This is a record that was kept under your supervision or direction?

A. Yes; my signature is on it.

Q. What date does it reflect as to the receipt of the candy in your store?

A. What day did I receive it?

Q. Yes.

A. I received it the 26th of November, 1943.

Q. That was stamped?

A. It is stamped 26, 43.

Q. I show you Defendant's Exhibit J for identification, and I will ask you if you recognize that exhibit? [152]

A. Yes, I do.

Q. What does that exhibit reflect?

A. That is R.M.R.; what we call return of merchandise to the L. A. pool. We sent it to the L. A. pool.

Q. When you say "L. A. pool", you mean the L. A. pool stock warehouse?

A. Yes.

Q. What amount does it show was returned?

A. 2943 pounds.

Q. Does it reflect the date on which it was returned, the candy?

A. I returned it—I made it out the 22nd of January, 1944.

Q. Showing you Defendant's Exhibit K for identification, I will ask you if you recognize that?

A. Yes, I do.

Q. Is that a record that was kept under your supervision?

(Testimony of Marie V. Pelster.)

A. It had to go through my hands; it had to be signed by me.

Q. What does that reflect with reference to Pan O' Butter Fudge?

A. We took a knock-down.

Q. From what price?

A. From 89c to 69c. [153]

Q. Does it reflect the quantity of fudge on which you took a knock-down? A. Yes.

Q. What was the quantity?

A. 4300 pounds.

Q. And the date?

A. It was signed by me January 6, 1944.

Q. That was the date on which you took the knock-down? A. Yes.

Q. Mrs. Pelster, do you recall the condition of the fudge, of this Pan O' Butter Fudge?

A. Yes.

Q. When did you first make an examination of the fudge, or any part of it, with reference to the date that you received it?

A. It was the next day after we received it. We went through the fudge, and looked at it. We found it in terrible condition.

Mr. Rolston: I move to strike out the last of the answer.

The Court: Strike it out. Describe the condition.

A. We found it in a moldy condition, and we also found it in a very soft condition, kind of

(Testimony of Marie V. Pelster.)

runny, and we also found it in a very hard condition.

Q. With reference to the runny fudge, can you describe [154] more fully what you mean by "runny"?

A. Just mushy. We couldn't cut it.

Q. If you attempted to cut it, it would run together? A. Yes.

Mr. Rolston: I am going to object to that as leading. She can describe it, with no coaching from counsel.

The Court: All right.

Q. By Mr. Wheeler: What happened when you tried to cut it?

A. It just stuck to the knife; we just couldn't cut it. That was all; it just wouldn't cut.

Q. With reference to the hard candy, what was its appearance? A. The hardest candy?

Q. Yes.

A. It was so hard we just couldn't cut it; that's all.

Q. With reference to its color?

A. It was moldy; it was white on top.

Q. With reference to the condition that you described as being moldy, where did the mold appear?

A. Well, around the nuts, and mostly right in the center part.

Q. Did you sell any part of the fudge that you received? A. Yes, we did.

Q. What part of it did you sell? [155]

(Testimony of Marie V. Pelster.)

A. We sold the good. We sorted it, and sold what was salable.

Mr. Rolston: I move to strike that portion "which was salable" as a conclusion of the witness.

The Court: All right. It may be stricken.

Q. By Mr. Wheeler: When you say "salable", what do you mean? Describe the fudge; that was in a condition that you say was salable.

A. It could be cut, and was in a creamy form. It was very easy to cut, and creamy, and easy to stack. It would not run together.

Q. Where was the candy stored?

A. In our storeroom.

Q. Where was the storeroom located?

A. Located on the second floor.

Q. In what part of the building?

A. About the center.

Q. Was it a part of the storage portion of the building?

A. That is the stockroom where we keep all our merchandise.

Q. Is the candy stored in a separate storeroom?

A. Yes, sir.

Q. Was it near, or does the candy stockroom open directly into the office space or office area on the second floor? [156]

A. No. It is all stockroom. Ours is all fenced off. The candy department is fenced off.

Q. What is the condition of the stockroom with reference to temperature?

(Testimony of Marie V. Pelster.)

A. It's cool; it's never been warm, and it has a circulating system.

Q. Is it lighted? A. Not that I know of.

Q. In January, when you took the mark-down on the candy, did you make a further examination of the fudge? A. Yes, sir, we examined it.

Q. What was the condition of the fudge at that time?

A. Well, some of it, like I tell you; we put some aside that could not be sold, because it was too moldy and too hard, and we just took the best part and took the mark-down on part of it.

Q. Then when you returned a part of the candy to the pool stock did you make any further examination of the fudge? A. Yes, we did.

Q. What was the condition of the fudge that was returned to the pool stock?

A. Well, it was in the same condition; it was moldy, hard, and also that runny condition.

Q. Did you make any effort to dry the candy which was soft? [157] A. Yes, we did.

Q. Do you recall when you made that?

A. We did that the first time we opened it up and found one of the soft ones; we went and dried it out.

Q. Were you able to dry all of the fudge?

A. No, sir.

Q. By drying, what did you do?

A. We left it open under a light, you know, just open, with the waxed paper so that anything

(Testimony of Marie V. Pelster.)

wouldn't get on it. We tried to dry it out that way, but it didn't work.

Q. In other words, you exposed it to the air?

A. Yes, sir.

Q. How many employees did you have in the candy department during the Christmas period?

A. In 1943 I had 34 employees.

Q. What was the number that you normally had? A. After Christmas I had 14.

Q. Did you have any other fudge stored in the stockroom at that time?

A. I don't remember.

Mr. Wheeler: You may examine.

Cross Examination

By Mr. Rolston:

Q. Have you ever handled any other fudge?

A. Yes, we did. [158]

Q. When was that?

A. I can't give you the date. I don't know just when.

Q. Was it before or after the Pan O' Butter Fudge?

A. We handle another fudge. All the year round we get fudge.

Q. How often do your girls normally turn over, your employees? A. What do you mean?

Q. How long do they remain on the job?

A. The 14 I had when I was there; that was about eight months. Christmastime we had just extra girls.

(Testimony of Marie V. Pelster.)

Q. When did you sever your relationship with Sears, Roebuck?

A. On the 19th of August, 1944.

Q. Do I understand you correctly to state upon that first examination of the fudge you found these various conditions: Moldy, softness, runny, as well as hardness?

A. Yes, sir.

Q. Some of the fudge was that way at the very beginning?

A. Yes, sir.

Q. Did you report it to Mr. Ashby?

A. Yes, sir.

Q. Did he instruct you to attempt to dry it out?

A. Yes, sir. [159]

Q. Did any of the fudge dry out so that you could use any of the runny fudge?

A. No.

Q. None of it?

A. No.

Q. How many cases did you open?

A. I can't remember that; that's been too long.

Q. Do you remember whether you opened all of them?

A. Not at first, we did not, no, but I know when we sent it back we did; we opened each one.

Q. You opened each one?

A. Yes.

Q. At that time you still found some runny?

A. Yes, and we found two slabs in a case, that would be sticking together.

Q. What is the size of your stockroom?

A. I couldn't tell you that. I don't remember.

Q. You don't remember the size of the stockroom you put the candy in?

A. I don't remember exactly.

(Testimony of Marie V. Pelster.)

Q. I don't expect you to be exact. An approximation.

A. I couldn't tell you. I don't know.

Q. Do you have shelves?

A. Yes, we had shelves; lots of them.

Q. How high would the candy be stacked? [160]

A. About five slabs.

Q. On any occasion ten slabs? A. No.

Q. On any occasion two slabs?

A. Sometimes two, yes.

Q. But not over five? A. No.

Q. You recall that distinctly? A. Yes.

Q. You never stacked it up to your shoulders from the floor? A. No.

Q. None that you know of?

A. Not that I know of.

Q. Did this stockroom have any windows on the outside?

A. No, I don't think so. It has a circulating system, air-conditioned.

Q. You don't know whether it has any windows, however? A. I don't remember.

Q. Do you recall whether or not, when you say "fenced off", whether it was lattice work?

A. It's a regular fence.

Q. A lattice fence? A. Yes.

Q. It isn't a solid wall? [161]

A. No, it is a fence, a regular fence.

Q. Did you have any trouble with new girls and their dislike of handling this fudge?

A. Yes, I did.

(Testimony of Marie V. Pelster.)

Q. Did you report that to Mr. Ashby?

A. Yes, he knows that, because he was there when we were cutting it. They did not like it.

Q. They did not like to handle it because it was messy, and made their hands messy?

A. Yes.

Q. I call your attention to Defendant's Exhibit K for identification; that is, the mark-down order. I see it called for a mark-down of 4300 pounds. Is that your recollection of how much there was?

A. Yes.

Q. You examined that 4300 pounds at that time?

A. Yes.

Q. That was merchandise you felt was still salable? A. Yes.

Q. That was 4300 pounds?

A. Yes, that is what we looked at, and we thought we could sell it for that price for 69c.

Mr. Rolston: That is all. [162]

Redirect Examination

By Mr. Wheeler:

Q. Mrs. Pelster, did you have any complaint as to the handling of the fudge from the old girls, or your steady girls as well?

A. Yes, I did have a lot of complaints from my older girls. They did not like to handle it, either.

Q. With reference to this other fudge that you had in the storeroom, did you ever have any of that fudge mold?

(Testimony of Marie V. Pelster.)

Mr. Rolston: To which we are going to object as outside the issues of the case.

The Court: I will sustain the objection.

Q. By Mr. Wheeler: Now, Mrs. Pelster, with reference to the mark-down figure on the 4300 pounds, is it not a fact that that was the total stock you had in the store at the time?

Mr. Rolson: Just a minute. I am going to object to that. He is cross-examining his own witness.

The Court: That is permissible, in view of the questions you have asked in your cross examination. He can ask leading questions on redirect.

A. You know, I just can't remember everything. That is a long time to remember just exactly what we had in stock.

Q. By Mr. Wheeler: Isn't it a fact that you took the mark-down on the total stock that you had in the store? [163] A. Yes.

Mr. Rolston: I am going to object to that; and move that the answer be stricken upon the ground that she has already testified that she can't remember.

The Court: You can ask a witness, after she has made a statement about the 4300 pounds, to explain, to see whether she stand by the statement or not.

Mr. Wheeler: No further questions.

The Court: Call your next witness.

ELIZABETH H. BESCH,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Elizabeth H. Besch.

Direct Examination

By Mr. Wheeler:

Q. Did you bring records with you?

A. Yes, I did.

Mr. Wheeler: This will be the first one, which will be the retail requisition, dated 11/15/43, No. 130342.

The Clerk: L for identification.

Mr. Wheeler: The next will be the retail requisition dated 1/25/44, and it is No. 888279. [164]

The Clerk: M for identification.

Mr. Wheeler: This will be a mark-down form, dated 1/15/44, No. 292442.

The Clerk: N for identification.

Mr. Wheeler: And a mark-down form 292444, dated 1/15/44.

The Clerk: O for identification.

Q. By Mr. Wheeler: Mrs. Besch, you are a resident of Los Angeles? A. Yes, I am.

Q. You are employed by Sears, Roebuck and Company, are you? A. Yes, I am.

Q. For what period of time have you been employed by Sears, Roebuck and Company?

A. About six years.

Q. What is your present employment?

(Testimony of Elizabeth H. Besch.)

A. I work in the candy department. I am division manager.

Q. In what store?

A. Vermont and Slauson.

Q. How long have you been employed as division manager in the candy department?

A. Two years; as the division manager last November.

Q. What was your employment prior to that?

A. I worked in the candy department, and I worked as an extra.

Q. For what period of time?

A. Well, I would say for about three years.

Q. Showing you Defendant's Exhibit L for identification, I will ask you if you can identify that exhibit.

A. Yes, I can.

Q. What is it?

A. Well, that is the chocolate fudge we received.

Q. That is the requisition that covers the chocolate fudge that you received?

A. Yes.

Q. That was the Pan O' Butter Fudge?

A. That's right.

Q. That is a record that was prepared by you?

A. Well, this was made out by Mr. Ashby.

Q. It has been kept under your supervision?

A. That's right.

Q. What does it reflect?

A. Well, it shows that we received 5040 pounds of chocolate pecan fudge.

Q. Does that reflect the date on which you received it?

A. Yes, it does.

(Testimony of Elizabeth H. Besch.)

Q. What is that date?

A. December 6, 1943. [166]

Q. I show you Defendant's Exhibit M for identification, and ask you if you recognize that.

A. Yes, I do.

Q. What is it?

A. That is the R. M. R. on the pecan fudge.

Q. When you say "R. M. R.", what do you mean?

A. That means the merchandise has gone back to the pool stock.

Q. To the central warehouse? A. Yes.

Q. Does it reflect the quantity of fudge sent back? A. Yes, it does, 1566 pounds.

Q. Does it reflect the date on which the candy was shipped?

A. It says here on the 25th of January, 1944.

Q. Showing you the mark-down forms, Defendant's Exhibit N and O for identification, I will ask you if you recognize those records.

A. Yes, I do.

Q. What do they reflect with reference to the Pan O' Butter Fudge?

A. It is the mark-down on that Pan O' Butter Fudge; both of these.

Q. They were made by you at the time that you took the mark-down? [167]

A. They were made by me.

Q. What dates do they reflect that you took the mark-down?

(Testimony of Elizabeth H. Besch.)

A. One is on January 15, 1944; in fact, both of them are.

Q. Calling your attention to this Pan O' Butter Fudge, Mrs. Besch, do you recall receiving it in the store? A. Yes, I do.

Q. When did you make your first examination of any part of the fudge with reference to the date of its receipt?

A. Well, we examined it the very day that we received it.

Q. Did you examine any quantity of it, and what was its condition?

A. We opened about, I would say, maybe 15 boxes, and part of it was moldy.

Q. What was the condition of the part that was not moldy?

A. It was very soft and runny.

Q. Did you make any effort to cut the candy?

A. Yes, we did.

Q. What happened when you endeavored to cut it?

A. We stopped. We couldn't cut it. The knife just stick to it, and it was impossible to cut it.

Q. Was there some portion of the candy that could be [168] used?

A. Yes, there was part of the candy that could be used.

Q. What was the condition of the candy that could be used?

A. It was creamy and kind of firm; was easy to cut.

(Testimony of Elizabeth H. Besch.)

Q. Did you make any effort of drying the candy that was soft? A. Yes, we did.

Q. What was your experience with reference to drying the soft candy?

A. It just wouldn't dry.

Q. What did you do in drying it?

A. We took the lids off and paper, and set the open boxes on the shelves, exposing it to the air.

Q. Did you make any further examination of the candy? Well, did you make a complete examination of all of the candy? A. Yes, I did.

Q. At what time did you make that examination?

A. Oh, a few days after we received the merchandise.

Q. What was the condition of all of the merchandise? I mean, what did your examination of all of the merchandise disclose?

A. Well, part of it was very bad; it was moldy; and part of it was very soft and part of it was in a salable condition, I mean, a good condition.

Q. What did you do with that which was moldy?

A. I just set it aside.

Q. Did you sell any of the candy?

A. Not of the moldy candy, I did not.

Q. Did you sell any part of the total shipment?

A. Yes, I did.

Q. Did you make a further examination of the candy at the time you took a mark-down?

A. Yes, I did.

Q. Did you find any more of the candy that was

(Testimony of Elizabeth H. Besch.)

moldy than had been moldy at the time of your first examination? A. No, I didn't.

Q. Did you make any further examination of the candy at the time that you returned the merchandise to the pool stock? A. Yes, I did.

Q. What was the condition of the candy which you returned to the pool stock?

A. Well, it was moldy and very dry.

Q. When you say it was very dry, just what do you mean?

A. I mean that you just couldn't cut it; it was so hard we just couldn't get a knife through it.

Q. What was its condition with reference to appearance?

A. It was kind of grayish-looking.

Q. Was any of the hard candy or dry candy molded? [170] A. Yes, it was.

Q. Where did the mold appear?

A. Well, under the nuts and in the center; more in the center of the slab of fudge.

Q. How many girls did you have in the candy department during that period, Mrs. Besch?

A. Well, I can't say exactly, but I believe it was about 40.

Q. That was during the Christmas period?

A. That's right.

Q. How many girls do you have normally?

A. About 12.

Mr. Wheeler: I have no further questions.

(Testimony of Elizabeth H. Besch.)

Cross Examination

By Mr. Rolston:

Q. Mrs. Besch, referring to Exhibit N for identification, does that represent all the fudge that you had on hand as of that day? A. Yes, it does.

Q. Had you previously sold all of the marked-down merchandise? A. Yes, we had.

Q. Did you have any difficulty with your girls regarding the selling of this pecan fudge?

A. Yes, I did. [171]

Q. They did not like to handle it?

A. They did not like to handle it, because they couldn't get it out of the pan.

Q. When you say you made a complete examination, do you mean you opened each and every case?

A. That's right.

Q. You know there were some 280 cases?

A. Yes, I remember that.

Q. You opened each and every one of them?

A. Yes, with the exception of what we had out on the floor that was cut.

Q. Did you look at the bottom layer as well as the top layer? A. Yes, we did.

Q. You took out the top layer? A. Yes.

Q. Did you, yourself?

A. My assistant and my stock boy helped me.

Q. How long did that examination take?

A. It took every bit of three hours.

Q. Did you advise Mr. Ashby of the result of your examination? A. Yes, I did.

Q. Did he come over and look at it?

(Testimony of Elizabeth H. Besch.)

A. Yes, he did. [172]

Q. You say none of the cases that you opened and tried to dry dried sufficiently to be used?

A. No, they did not.

Q. None of them? A. No.

Q. If I recall correctly, your second examination was at the time of the mark-down?

A. That's right.

Q. Did you count the number of cases that you found in a moldy condition at the time of your first examination? A. Yes, I did.

Q. Did you make a record of the number of cases?

A. No, I made a record of how many pounds we had; not of the cases.

Q. Did you make a record of how many cases that were soft? A. I did not.

Q. Did you make a record of how many cases that were good, and could be used?

A. No, I did not.

Q. Did you make a record of the poundage?

A. No, I did not, except the moldy fudge.

Q. You just made a record of that?

A. That's right.

Q. Do you still have that record? [173]

A. I couldn't say. I don't believe so.

Q. You don't believe so? A. No.

Mr. Rolston: That is all.

Mr. Wheeler: I have no further questions.

The Court: Call your next witness.

Mr. Wheeler: Mrs. Benson.

BARBARA BENSON,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: What is your name?

The Witness: Barbara Benson.

Direct Examination

By Mr. Wheeler:

Q. I offer retail requisition No. 130344, dated 11/15/43.

The Clerk: P for identification.

Mr. Wheeler: Retail requisition No. 341876, dated 1/25/44.

The Clerk: Q for identification.

Mr. Wheeler: Mark-down form No. 147925, dated 12/30/43.

The Clerk: R for identification.

Mr. Wheeler: Mark-down form dated 1/22/44, No. 300401. [174]

The Clerk: S for identification.

Q. By Mr. Wheeler: Mrs. Benson, are you a resident of the City of Long Beach?

A. Yes, sir.

Q. You are employed in the Long Beach store of Sears, Roebuck and Company?

A. Yes, sir.

Q. How long have you been so employed?

A. Well, I have been with Sears, Roebuck almost four years.

Q. And you are presently employed as division manager of the candy department of the Long Beach store? A. That's right.

(Testimony of Barbara Benson.)

Q. How long have you been employed in the candy division?

A. Two years ago last September.

Q. So you were employed as division manager during the period from October, 1943 to February, 1944?

A. Yes, sir.

Q. I call your attention to certain chocolate pecan fudge known as Pan O' Butter Fudge. Do you recall that fudge?

A. Yes, I do.

Q. Did you have it in your store during the period from October, 1943 through February, 1944?

A. Yes, we did.

Q. I show you Defendant's Exhibit R for identification and I will ask you if that is a company record, and if it came from your control, Mrs. Benson?

A. Yes, sir, this accompanies the merchandise into our store from the pool stock.

Q. You got that requisition at the time you received the Pan O' Butter Fudge?

A. Yes, sir.

Q. Did you make a check of the Pan O' Butter Fudge that you received, against that record?

A. Yes, I did.

Q. What does that record reflect with reference to the quantity of merchandise that you received in the Store?

A. You mean does this quantity check with what we received?

Q. Yes. A. Yes, it does.

Q. What was the quantity that you received?

(Testimony of Barbara Benson.)

A. On this one, 4474, that I received as an inter-store transfer from the Pico store.

The Clerk: Counsel has handed me a document which I have marked T for identification.

Q. By Mr. Wheeler: And it is a retail requisition No. 83091, dated 1/17/44. [176]

Mr. Rolston: May I see that, counsel?

Q. By Mr. Wheeler: I will ask you, showing you Defendant's Exhibit T for identification, if that is a record that accompanied the fudge that was transferred from the Pico store?

A. Yes, it is.

Q. Does that record reflect the quantity of fudge you received from the Pico store?

A. Yes, sir.

Q. What was the quantity?

A. 504 pounds.

Q. With reference to the original shipment, on what date did you receive the 4000 and some pounds? A. November 23rd.

Q. With reference to the 500-odd pounds that you received from the Pico store, what date did you receive that?

A. I received—I don't see the receiving date on this, but it was shipped from the Pico store on the 18th of January.

Q. Apparently, according to the copies I will show you, that does bear the shipping date.

A. We received it on the 24th of January—no, sir, that isn't right, either; I am sorry. This is a copy of what we sent back to our pool stock. That was the moldy fudge. [177]

(Testimony of Barbara Benson.)

Q. I am sorry; I handed you the wrong record.

A. The date that we received this inter-store transfer from Pico was January 20th.

Q. 1944? A. Yes, sir.

Q. I show you Defendant's Exhibit No. R for identification, and I will ask you if that record was under your supervision and control?

A. This record was not written by me, but I knew it was written.

Q. It was written under your direction, was it?

A. Yes, sir.

Q. It has been maintained in your department?

A. Yes, sir.

Q. What does it reflect, Mrs. Benson?

A. This was after Christmas, and we had to take a mark-down from 89c to 69c so we could get rid of the candy that was salable.

Q. So you took that mark-down? Does that reflect the number of pounds?

A. It isn't the total number of pounds. We took part of it to get it into this period. Then we took part of it for the next period.

Q. Showing you Defendant's Exhibit S for identification, I will ask you if that is a record which you made? [178]

A. Yes, sir, I did. The total of these two is the entire mark-down that I took, from 89c to 69c.

Q. That relates to this Pan O' Butter Fudge?

A. Yes, sir.

Q. The first date that you took the mark-down was what? A. It was on December 30, 1943.

(Testimony of Barbara Benson.)

Q. And you took the balance of the mark-down—

A. January 22, 1944.

Q. I show you Defendant's Exhibit Q for identification, and I will ask you if this is a record which you kept under your supervision?

A. Yes, this is, by our Los Angeles warehouse, 144 pounds of fudge.

Q. What does it mean by R.M.R.?

A. That is the paper we make out when we send our merchandise back to our Los Angeles pool stock.

Q. Did you check the merchandise?

A. Yes, I did.

Q. What was the quantity returned?

A. 144 pounds.

Q. What date did you return it?

A. January 24, 1944.

Q. Did you make any examination of this Pan O' Butter Fudge at or about the time you received [179] it? A. Yes, I did.

Q. What did your examination disclose?

A. Well, I did not have to go on the inside of the box to know there was something wrong, because it was leaking all over the floor of the warehouse. It was quite runny. Then I had my stock man help me open boxes, and it was very soft.

Q. Did you make a complete examination of the candy at the time? A. Yes, sir.

Q. Did you make any further examination of the candy at a later date?

A. Yes, I did, when I took my mark-down, to

(Testimony of Barbara Benson.)

see how much I had left. Then I examined it again when I sent it back to the Los Angeles pool stock.

Q. At the time that you sent the candy back to the Los Angeles pool stock what was the condition of the fudge that you returned or sent back?

A. It was moldy, and some of it was fermented, it was so soft. I guess they didn't cook it enough.

Mr. Rolston: I move to strike that out.

The Court: Strike it.

A. It had a bad odor, and was very soft and bubbly; some of it was entirely different; it was hard and moldy.

Q. By Mr. Wheeler: Did you make any examination of [180] the fudge that you received from the Pico store?

A. I did. When I talked to the division head at the time, I told her——

Mr. Rolston: I object to any conversation.

The Court: You can tell only about the condition of the fudge that you received from the store; not what she told you.

A. It was all right. It was in salable condition.

Q. By salable condition, what do you mean?

A. It was not fermented. It was not moldy, and we could cut it.

Q. How many girls did you have in the candy department during that period of time?

A. Well, before Christmas we had about 30. After Christmas I think it was about 11.

Q. Do you recall when you finally disposed of all of the candy?

(Testimony of Barbara Benson.)

A. Well, I disposed of the last of it when I sent the 144 pounds back to the Los Angeles pool stock.

Mr. Wheeler: I have no further questions.

The Court: How much did you sell after the mark-down, do you remember?

A. Altogether I marked down about 1600 pounds, and then take away 144 pounds from 1600 pounds; that's what I sold [181]

Cross Examination

By Mr. Rolston:

Q. Calling your attention to this figure you just gave the court, will you look at Exhibit S for identification? Is that 48 pounds; not 480 pounds?

A. No, sir, it is not 48. You examine it a little closer and you will see it is 487. I can see now how you could mistake that for 48 pounds, because it looks like the 7 was a pound symbol.

Q. You only took a mark-down of 20c?

A. At that time, yes.

Q. The price \$9.60 reflects only 48 pounds' mark-down?

A. That was an error in our accounting department. I don't see these things after I turn them in to the auditor. Would you like to see it, sir?

The Court: Yes, I had better see it. When I looked at the 7 I thought it was a pound mark.

A. Yes; it is really plain when you study it a little bit.

Mr. Rolston: You are only charged \$9.60.

A. Yes, and that made my inventory short.

(Testimony of Barbara Benson.)

The Court: You got into more trouble?

A. That's right.

Q. By Mr. Rolston: In fact, you had trouble with the girls on this fudge? [182]

A. Yes.

Q. They did not like to handle it?

A. No, sir.

Q. Did I understand you correctly to say that you sold all of the fudge that came from Pico?

A. Yes, I did, that had been inspected.

Q. You had not inspected it, though?

A. I inspected it, yes, sir.

Q. All of that was sold at the mark-down price?

A. Yes, it was marked down before it came in to me.

Q. Except for the 144 pounds that was returned to the pool you sold all of the fudge that was assigned to you, as well as the Pico, is that right?

A. Yes, sir.

Q. Mrs. Benson, is it not a fact, calling your attention to Exhibit R for identification, that that was all the fudge you had left on hand at the time you took that mark-down?

A. No, sir, that was not all the fudge we had left over. That was all that we took a mark-down on, on that part of the fudge.

Q. It is a matter of policy to take a mark-down on candy right after Christmas?

A. Yes, sir, it is. I was out ill for a week.

Mr. Rolston: That is all.

(Short recess.) [183]

OLIVER J. BEMIS,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Oliver J. Bemis.

Direct Examination

By Mr. Wheeler:

Mr. Wheeler: I will introduce first retail requisition dated 11/15/43, No. 130348.

The Clerk: U for identification.

Mr. Wheeler: The next is a retail requisition dated 1/17/44, No. 83091.

The Clerk: V for identification.

Mr. Wheeler: And a mark-down form No. 216543, dated 1/22/44.

The Clerk: W for identification.

Q. By Mr. Wheeler: Mr. Bemis, you are employed by Sears, Roebuck and Company in their Pico store?

A. Yes.

Q. You are employed as merchandise manager in that store? A. That is right.

Q. How long have you been so employed?

A. I have been with the company 15 years.

Q. How long have you been merchandise manager in the [184] Pico store? A. Three years.

Q. Will you describe briefly the functions of your office, your position?

A. Well, insofar as the candy department is concerned I supervise the ordering, the display of

(Testimony of Oliver J. Bemis.)

the merchandise, mark-ups, mark-downs, returns, and things of that nature.

Q. During the period from October, 1943, through February, 1944, who was the division manager in the candy department?

A. Miss Elma Shipley.

Q. Is she at present with the company?

A. No, she has severed her connections, to be married.

Q. Do you know where she is now?

A. Quantico, Virginia.

The Court: She is going to be be married to a sailor?

A. A marine captain.

Q. By Mr. Wheeler: I show you Defendant's Exhibit U for identification, Mr. Bemis, and I will ask you if that is a copy of a record which you maintained under your supervision?

A. Yes, that's the requisition that the merchandise came in on.

Q. And is a check made of the merchandise against the requisition, as it comes in the store?

A. Yes, it is checked in the marking room for quantity.

Q. If an amount different than that shown on the requisition is received, would there be a notation made?

A. There would be an irregularity made, yes.

Q. What does the record reflect with reference to the receipt of fudge?

(Testimony of Oliver J. Bemis.)

A. It reflects we received 4482 pounds on December 7th.

Q. 1943? A. 1943.

Q. I show you Defendant's Exhibit V for identification and I will ask you if that is a record which you maintained under your supervision?

A. Yes. This is a requisition, and that relates to the transfer of 504 pounds, to the Long Beach store on January 17, 1943.

Q. I show you Defendant's Exhibit W, and ask you if that is a record which is maintained under your supervision?

A. This is a mark-down that we took on January 22nd from 89c to 69c on the fudge.

Q. Do you recall the receipt of Pan O' Butter Fudge in the Pico store during the period from October, 1943, to February?

A. Yes, I recall it coming in. I recall the fudge coming in in December, 1943.

Q. Did you make an examination of the fudge that was [186] received?

A. Yes, I was called to the marking room when it came in, and examined some of it.

Q. Do you recall the condition of the fudge at the time you received it? A. Yes, I do.

Q. What was the condition of the fudge that you examined at the time?

A. It was quite soft.

Q. Was the fudge cut in your presence?

A. Yes, I watched the girls cut it on the tables.

(Testimony of Oliver J. Bemis.)

Q. What, if anything, did you observe with reference to cutting the fudge?

A. It was very difficult to cut.

Q. Did you make any further examinations of the candy at a later date?

A. Yes, I did. I noticed from time to time that some of it was very hard, and couldn't be cut, and had to be chopped.

Q. What, if anything, did you observe with reference to the appearance of this very hard candy?

A. Just very hard; that was all.

Q. With reference to color.

Mr. Rolston: I object to the leading questions, your Honor. [187]

The Court: I think the witness can describe the condition, having had experience as a merchandise man. Go ahead, and describe the condition.

A. It was brown color, and it was very hard, and chipped into very small pieces.

Q. By Mr. Wheeler: Did you make any further examination of the fudge?

A. Other of it was very soft, and very hard to do anything with. If I may explain, your Honor, after it was cut it was so soft, if you put it back it would just congeal into one mass.

Q. Do you know if any of the fudge was returned to the pool stock warehouse?

A. We returned in the neighborhood of 1600 pounds to the pool stock.

(Testimony of Oliver J. Bemis.)

Q. Did you make any examination or inspect any fudge that went back to the pool stock?

A. Our department manager and some of the stock boys opened every carton.

Q. By Mr. Rolston: Do you know that they opened them? Were you there?

A. Yes, I saw them opened.

Q. You watched them opened? A. Yes.

Mr. Rolston: Proceed.

A. That I observed or looked at was moldy. Mold had [188] formed.

Q. By Mr. Wheeler: Do you know how long Miss Shipley had been with the company?

A. Five years.

Q. How long had she been head of the candy department? A. About two years.

Q. What experience had she had prior to that in candy?

A. She had had no experience in candy.

Q. Where was the stockroom in the Pico store, the candy stockroom?

A. Our stockroom was on the main floor, south end of the building, just off of the shipping dock.

Q. Was it directly connected with the selling area? A. No.

Q. Was it heated?

A. Not in any way, no.

Q. But you have a ventilating system?

A. Yes, a circulating system.

Q. Was the candy stockroom separate from the warehouse on the receiving dock area?

(Testimony of Oliver J. Bemis.)

A. Yes, partitioned off in an area of its own.

Q. What was the temperature, or what was the situation in the candy stockroom with reference to temperature?

A. It's probably a little cooler than room temperature, because it is right off our receiving and shipping area. [189] The doors are open; therefore, with the wire screen that marks it off, it is fairly cool, I would say.

Mr. Wheeler: I have no further questions.

Cross-Examination

By Mr. Rolston:

Q. Mr. Bemis, how many departments do you have under you as merchandise manager?

A. 24.

Q. Do you inspect all merchandise that comes in every department?

A. Not all of it, but I try to inspect part of it.

Q. Do you recall whether or not any attempt was made to dry out any of the fudge?

A. Yes, we received instructions from Mr. Ashby to that effect, and we did as instructed.

Q. Did you sell the fudge that was dried out?

A. Yes, where we could dry it out we sold it.

Q. Referring to Defendant's Exhibit W for identification, that is, the mark-down form, it is dated January 22nd. Was any mark-down made prior to that?

A. Yes, we marked a small amount down on the 11th of January.

(Testimony of Oliver J. Bemis.)

Q. Do you recall how much?

A. 100 and some pounds, I believe.

Q. Do you have any record of that? [190]

A. Yes.

Q. I mean the Pico store. Did you bring that record with you? A. Yes.

Mr. Rolston: Do you want to step down and help him, counsel, find it? I suppose you will want this marked.

Mr. Wheeler: Yes, if you will.

The Clerk: X for identification. It is No. 216539, mark-down form dated 1/11/44.

Q. By Mr. Wheeler: Referring to Defendant's Exhibit X for identification, that is the slip you are referring to? A. Yes.

Q. Was there any other mark-down made at any other time of this fudge?

A. Not that I recall.

Q. Was there any mark-down made, a special mark-down written out in connection with Defendant's Exhibit V for identification? That is the requisition sending 500 pounds to Long Beach.

A. As I recall it, this transfer to Long Beach was included in this mark-down.

Q. Of the later mark-down? A. Yes.

Q. In other words, at the time it was shipped you contemplated marking it down? [191]

A. We knew it was going to be marked down.

Q. When did you actually mark it down on the floor of the store?

A. The 22nd of January, I believe it was.

(Testimony of Oliver J. Bemis.)

Q. Didn't you mark it down on January 11th, as a matter of fact?

A. That was just the 136 pounds, but the big mark-down was taken on the 22nd.

Q. The 136 pounds were sold at the mark-down price? A. Yes.

Q. Was any of the fudge sold at the mark-down price from January 22nd?

A. That I don't recall.

Q. Did you report any of the situation to Mr. Ashby? A. Yes, we did.

Q. When did you first report to him?

A. We reported it early in December, 1943.

Q. Would it be on or before the 6th of December?

A. No, because we did not receive it until the 7th.

Q. Did you sell any of the hard fudge?

A. Yes, we did.

Q. Did you sell any of the moldy fudge?

A. No, sir.

Q. So far as you can recall there was no moldy fudge at the time it first came in, and your first examination? [192]

A. Our first examination, as I recall, did not reveal any moldy fudge.

Q. It was not until after the mark-down or the time of the shipment to Long Beach that any mold was noticed?

A. Will you read the question?

(Question read by the reporter.)

A. We discovered mold before then.

(Testimony of Oliver J. Bemis.)

Q. How long before, if you recall?

A. I would say three weeks.

Q. Around the first of the year?

A. Before that.

Q. If I understand your testimony, Mr. Bemis, you never fully examined each and every carton at all, did you?

A. No, I didn't personally.

Q. So you do not know the condition of all the fudge that was returned?

A. No, I am taking the word of the girl that supervised the department at that time; but I did examine at least a dozen cartons of it.

Q. As a matter of fact, Mr. Bemis, all of the fudge that was returned to the pool stock warehouse was all the fudge that you had left on hand, is that right?

A. That is right.

Mr. Rolston: No further questions. [193]

Redirect Examination

By Mr. Wheeler:

Q. Mr. Bemis, in connection with the drying of the fudge, you did receive a bulletin from Mr. Ashby concerning that, did you?

A. The drying of the fudge, yes, we received a bulletin.

Mr. Wheeler: Bulletin A-167, dated November 29, 1943.

The Clerk: Y in evidence.

Mr. Rolston: I have no objection to it going into evidence.

(Testimony of Oliver J. Bemis.)

The Court: I think all of the exhibits used to refresh the witnesses' recollection should all be offered.

Mr. Wheeler: Yes, I shall. You have no objection to these?

Mr. Rolston: No.

Mr. Wheeler: I have no further questions.

Q. By Mr. Rolston: After you received this you did dry out some of the fudge?

A. Yes.

Q. And you sold it as it dried out?

A. Some of it.

Mr. Rolston: That is all.

EVELYN VON KROG,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Evelyn Von Krog.

Direct Examination

By Mr. Wheeler:

Mr. Wheeler: I will offer retail requisition No. 53448, dated 1/21/44.

The Clerk: Z for identification.

Mr. Wheeler: And mark-down form No. 907115, dated 1/10/44.

The Clerk: AA for identification.

(Testimony of Evelyn Von Krog.)

Q. By Mr. Wheeler: Mrs. Von Krog, you are a resident of Los Angeles, are you?

A. Glendale.

Q. You are employed in the Glendale store of Sears, Roebuck and Company? A. Yes, sir.

Q. As the division manager of the candy department? A. Yes, sir.

Q. How long have you been employed as the division manager of the candy department?

A. Since December 10, 1941.

Q. Were you employed by the company prior to that time? [195]

A. Yes, for almost six months.

Q. In what capacity were you employed during that period?

A. Part of the time in the drug department, and part of the time in the ready-to-wear. That's in the marking room.

Q. Calling your attention to the period from October, 1943, to January 1, 1944, I will ask you if you recall the receipt of Pan O' Butter in the store?

A. Yes, sir.

Q. Do you recall the approximate date on which the fudge was received?

A. I believe it was somewhere in the middle of November.

Q. Do you recall the quantity of fudge that was received?

A. Somewhere around 2500 pounds.

Q. Did you make any examination of the fudge, or any part of it, at the time it was received?

(Testimony of Evelyn Von Krog.)

A. Part of it. We opened somewhere around, I would say, 1000 pounds.

Q. What did the examination that you made disclose with reference to the fudge?

A. Part of it was saleable; it was creamy and easily cut and part of it was moldy and part of it was runny. [196]

Q. Did you make any effort to cut the fudge which you describe as runny?

A. Yes, we did. It stuck to the knife, and wouldn't hold its shape in squares at all. It would run together on the pan.

Q. Did you receive any instructions from Mr. Ashby with reference to the drying of the fudge?

A. Yes, we did.

Q. I call your attention to Defendant's Exhibit Y, and I will ask you if that is similar to the copy which you received? A. Yes, it is.

Q. Did you make an effort to dry the fudge?

A. Part of it we did. We have a small stock-room on the main floor in which we keep all our candy stock, and we have a very little room in that, and we opened part of it and tried drying it. Some of it dried enough so we could cut it and use it, and some of it did not.

Q. Did you make any further examination of the candy prior to January 1, 1944?

A. No, not other than this amount we had worked with, this 1000 pounds which we had sold most of it by that time.

Q. On January 1st you became ill?

(Testimony of Evelyn Von Krog.)

A. I had pneumonia; from January 1st I was off until January 22nd. [197]

Q. I show you Defendant's Exhibit Z for identification. Was that record prepared by you?

A. No, it was not. I was back half days during this time, just prior to the inventory in order to help Miss Adamson, my assistant, out.

Q. So you didn't prepare the record?

A. No.

Q. Did you make any examination of the fudge subsequent to that return?

A. Yes, I looked over part of it.

Q. What did your examination at the time it was returned reflect?

A. I found that it was moldy around the nuts and fudge, and some of it was very runny and had run clear through the paper dividing the two slabs. Some of it was very hard, and we couldn't get the slabs apart.

Q. You have referred to the stockroom. Where was it located in the Glendale store?

A. It was located on the main floor, the candy stockroom.

Q. Where is it situated with reference to the main selling area?

A. It's in the south end of the building, and there's just two doors leading into the main selling area. The rest of it is off entirely from the main selling area. [198]

The Court: Is it partitioned?

A. Partitioned, yes. It's a big wall.

(Testimony of Evelyn Von Krog.)

Q. By Mr. Wheeler: The stockroom is situated in the area near the receiving docks, is it?

A. Yes, it is right off of the receiving dock.

Q. Do any of the doors from the candy stockroom lead directly or open directly into the selling area? A. No.

Q. During the period of December what was the condition with reference to the temperature in the stockroom?

A. We usually preferred to put a sweater on or a coat when we went out there. It is quite cold. The doors are opening outside, and then it is screened all around the stockroom with chicken wire. Even the door's made of chicken wire screening

Q. How many girls were there in the candy department?

A. In our main floor candy department, where we handle fudge, where we handle candy only, we had, I would say, around 12 girls.

The Court: That is regularly?

A. No, sir, that was only during Christmas.

Q. How many did you have regularly?

A. Regularly we have around from two to three.

Q. By Mr. Wheeler: Your candy department is divided, in Glendale, part of it being on the first floor, and [199] part of it in the basement?

A. That's right. Our specialty food and tobacco department is in the basement. The candy department is on the main floor. Our stock room is also separated in the same manner.

(Testimony of Evelyn Von Krog.)

Q. You only sell candy on the main floor?

A. That's right.

Mr. Wheeler: I have no further questions.

Cross Examination

By Mr. Rolston:

Q. As I understand your testimony, Mrs. Von Krog, you never did examine all of the fudge?

A. No.

Q. And the vast majority of the fudge that you did examine on the first occasion was all sold?

A. Most of it was, although there was some we had to put back.

Q. That was before you became ill?

A. That was before I became ill, yes.

Q. It is normal for your department to take a mark-down after Christmas on candy, and specialty items; is it not? A. Yes, it is.

Q. The girls did not like to handle this? It was pretty messy, wasn't it?

A. That's right; they objected very heartily.

Q. By Mr. Rolston: You have the warehouse record, Mr. Wheeler?

Mr. Wheeler: Yes.

Q. By Mr. Rolston: Were you there when this merchandise was returned to stock?

A. I was there half days at that time.

Q. All of the fudge was returned to stock?

A. Everything we had left on hand.

Q. Everything that was left on hand?

A. Yes.

(Testimony of Evelyn Von Krog.)

Q. I show you Exhibit AA, which is the mark-down order. That was in your absence, was it not?

A. Yes, that was while I was out ill.

Mr. Wheeler: I have another witness as to that part, counsel.

Mr. Rolston: O. K. No further questions.

EVA ADAMS,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Eva Adams.

Direct Examination

By Mr. Wheeler: [201]

Q. Miss Adams, you reside in Los Angeles?

A. Yes, I do.

Q. You are employed by Sears, Roebuck?

A. Pardon me, sir. I am residing in Glendale. I work in Los Angeles.

Q. You are employed by Sears, Roebuck and Company in the Boyle Street or 9th Street store at the present time? A. Yes, I am.

Q. Are you employed there as a division manager? A. That's right.

Q. During the period of December and January of 1943, where were you employed?

A. I was employed at Sears' Glendale store.

(Testimony of Eva Adams.)

Q. What was your employment there?

A. I was in the candy department as assistant to Mrs. Von Krog.

Q. When did you first commence work in the candy department at the Glendale store?

A. In September. I don't remember the exact day, but in September of 1943.

Q. Had you had any prior experience in the candy business? A. Oh, yes, many years.

Q. For what company?

A. The Pig 'n' Whistle, in Los Angeles. [202]

Q. For what period of time were you employed by the Pig 'n' Whistle?

A. Over a period of 12 years.

Q. In what capacity were you employed?

A. As head candy girl of various stores that I worked in.

Q. In Los Angeles?

A. In Los Angeles, Pasadena, and Santa Barbara.

Q. Did you have any prior experience in candy other than with the Pig 'n' Whistle?

A. Yes, I did.

Q. Where was that?

A. I worked with the Betsy Ann Ice Cream and Candy Company. They are no longer in business now, but that was before I went with the Pig 'n' Whistle.

Q. How long were you employed by that company? A. Oh, I would say over a year.

Q. Did you have any other experience in candy?

(Testimony of Eva Adams.)

A. Yes, I worked a short time for the Albert Sheetz Company.

Q. In what capacity did you work?

A. I worked in the capacity of candy salesgirl.

Q. Were you employed in a similar capacity with the Betsy Ann Candy Company?

A. Yes. [203]

Q. Do you recall the Pan O' Butter Fudge in the Glendale store? A. Yes, sir, I do.

Q. When did the candy first come to your attention? A. The early part of January.

Q. Prior to the 1st of January, where did you perform your duties?

A. Mostly in the basement, in the food department of the Glendale store.

Q. After the 1st of January?

A. In the candy department mostly.

Q. Did you make any examination of the Pan O' Butter Fudge after the 1st of January?

A. Yes, I did.

Q. What did that examination disclose?

A. Well, I found that it was extremely moldy, and there was a sort of a web on top of it, and what fudge we were able to cut there was discoloration through the fudge, and some of it on top was very moist, like syrup floating around on the top of the squares of the fudge.

Q. Was that the condition of all of the fudge?

A. No, I went through the entire remainder of the fudge that was there, and I segregated the part

(Testimony of Eva Adams.)

that I thought would be saleable and the part that I thought was not saleable.

Q. When did you make that segregation? [204]

A. Well, I made that segregation the first part of January. I can't remember exactly the day, but it was the first part of January.

Q. Did you make any record at that time?

A. Yes, I did.

Q. Of the segregation that you made?

A. Yes, I did.

Q. Do you have that record with you?

A. Yes, right here. It's just on that one page.

Q. Do you recall the quantity of fudge that was unsaleable at that time?

Mr. Rolston: To which I object upon the ground that it calls for a conclusion.

The Court: She has already said she made the segregation. Go ahead. Overruled. You may answer.

A. Well, I think altogether I examined 1500 pounds, and out of that I found over 600 to be salable and over 800 to be what I termed moldy and unsaleable.

Q. Did you have anything to do with the making of the mark-down on the candy?

A. Yes, I believe I did.

Q. I show you Exhibit AA for identification, and I will ask you if that is a record that was prepared by you, or kept under your supervision, during that period? A. I made this myself. [205]

Q. What does it reflect?

(Testimony of Eva Adams.)

A. Well, it's a mark-down taken on 1652 pounds of fudge from 89c to 69c.

Q. That was at the time that you made this examination, was it? A. Yes, sir.

Q. Did you make a later examination of the fudge? A. Yes.

Q. Showing you Defendant's Exhibit Z for identification, I will ask you if you prepared this?

A. No, I did not. I didn't prepare this.

Q. Did you make an inspection of the fudge at the time that the fudge was returned?

A. Yes, I inspected it many times to see what condition it was in, from time to time; not all of it, you understand, but in part.

Q. At the time that the fudge was returned to pool stock did you make an inspection or examination of all of the fudge? A. Yes, I did.

Q. What was the condition of all of the fudge that was returned to pool stock?

A. It was unsaleable and even a worse condition existed than what I mentioned. I found it with mold around the nuts and liquid on the top and a discoloration of the fudge. [206]

Q. It wasn't a good color?

A. It wasn't a natural color.

Mr. Wheeler: I have no further questions.

Cross Examination

By Mr. Rolston:

Q. Mrs. Adams, do you recall the exact day that you made the examination that you testified to?

A. The first examination that I made?

(Testimony of Eva Adams.)

Q. The first examination that you made where you said there were 600 pounds good and 800 bad.

A. Around the first week in January.

Q. It was prior to the mark-down, is that right?

A. Yes, I am quite sure that's right.

Q. You said over 600. Can you tell us a little more accurately how many pounds you found to be, in your opinion, good?

A. I can say it was over——

Q. You can refresh your recollection from notes. Those were made at the time you examined it?

A. Yes, at the time I examined it I made these. I found on hand that was saleable and good——

Q. In your opinion.

A. In my opinion, 683 pounds.

Q. How much was, in your opinion, moist and moldy and runny? A. 852 pounds. [207]

Q. Was that all the fudge you had on hand at that time?

A. Yes, I believe at this time—wait just a minute. I want to think, if you don't mind. If I may change something that I said; this record, as I recall it, was made prior to the time that the merchandise—just prior to the time the merchandise went back. The reason I say that is, the numbers of our pool stock, we are to put on our return requisition—this is No. 8708, and I am quite sure that was made at the time, just before we sent it back to the pool stock.

Q. Your testimony is that you made that ex-

(Testimony of Eva Adams.)

amination on or about January 21st, rather than the first week?

A. Yes, it was the latter part of January.

Q. That was the first time you examined the stock?
A. No, it was not.

The Court: It was the final examination, before you returned it?

A. That's right.

Q. When the final return was made, Mrs. Adams, all of the fudge that you had on hand went back, is that right?

A. I am not positive that all that we had on hand went back, or all that we considered unsalable went back. I am not sure; I don't want to say.

Q. However, your mark-down takes in all merchandise you had on hand at that time?

A. Yes, at the time that I inspected it.

Q. Did you make any attempt to dry out any of the so-called runny fudge?

A. Yes, I did. Some of it, when I took over when Mrs. Von Krog was ill, was out of the cartons.

Q. Did you use that fudge?

A. It did not dry out, sir.

Q. None of it?

A. None of it dried out, no, sir.

Q. Did you have any trouble with the girls, so far as the handling of it? Did they like to handle it?

A. I don't recall if we especially asked them if they liked to handle it in the stockroom. It was my business to go through this, and I did so, and

(Testimony of Eva Adams.)

what I thought was good I put up for sale, and what was not, I didn't.

The Court: What counsel means is, did the girls complain when they cut it? They cut the slabs——

A. That's right.

Q. Into little squares?

A. Yes. What I took out for sale, you were able to cut the part I segregated; you were able to cut it, and there was no complaint on it.

Mr. Rolston: That is all. [209]

Mr. Wheeler: I have no further questions.

(Whereupon an adjournment was taken until 1:30 p. m. of this same day, Wednesday, January 10, 1945.) [210]

Wednesday, January 10, 1945.

Afternoon Session, 1:30 o'clock

FRANCES MURRELL,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: State your name.

The Witness: Mrs. Frances Murrell.

Direct Examination

By Mr. Wheeler:

Mr. Wheeler: I offer retail requisition No. 130346, dated 11/15/44.

The Clerk: BB for identification.

(Testimony of Frances Murrell.)

Mr. Wheeler: Retail requisition No. 754992, dated 22nd, '44.

The Clerk: CC for identification.

Mr. Wheeler: Mark-down form No. 145652, dated 1/8/44.

The Clerk: DD for identification.

Q. By Mr. Wheeler: Mrs. Murrell, you are a resident of San Diego, California, are you?

A. Yes.

Q. And you are employed by Sears-Roebuck and Company as a division manager in the candy department? A. That's right.

Q. How long have you been employed by Sears, Roebuck and [211] Company?

A. Four years.

Q. You have acted as division manager for a considerable period of time? A. Yes.

Q. Calling your attention to Pan O' Butter Fudge, during the period from November, 1943, to February, 1944, did you have Pan O' Butter Fudge in the San Diego store? A. Yes, we did.

Q. Calling your attention to Defendant's Exhibit BB, I will ask you if that record was kept and maintained under your supervision and control?

A. Yes, it sure was.

Q. What is that record?

A. It shows that we received 1674 pounds of the pecan chocolate fudge.

Q. Does it reflect the date on which you received it?

A. We received it on December 8, 1943.

(Testimony of Frances Murrell.)

Q. You received the invoice at the time you received the fudge, is that correct?

A. That's right.

Q. And you checked the candy you received against the invoice or requisition?

A. That's right.

Q. Showing you Defendant's Exhibit CC for identification, [212] I will ask you if that is a record which was kept and maintained under your supervision and control? A. Yes.

Q. What is that record?

A. This shows that we shipped this from our store back to the L. A. pool stock, L. A.

Q. Does it show the quantity shipped back?

A. Yes, we shipped 1224 pounds.

Q. Does it show the date on which you shipped this? A. The 22nd of January, 1944.

Q. Showing you Defendant's Exhibit DD for identification, I will ask you if that was a record that was kept and maintained under your supervision and control?

A. Yes, it was. This shows the mark-down which we took.

Q. Does it reflect the quantity of merchandise that was marked down?

A. Yes, it shows we marked down 1344 pounds.

Q. Of the Pan O' Butter Fudge?

A. Yes.

Q. Does it show the date on which you took the mark-down?

A. Yes, I took this on January 8th, 1944.

(Testimony of Frances Murrell.)

Q. Mrs. Murrell, with reference to the date that you received the Pan O' Butter Fudge, did you make any examination [213] of the fudge at that time?

A. Yes, we always do. We always examine, not all of it, but most of every kind of merchandise we get in; and we did this.

Q. What did your examination disclose?

A. The first we opened up was hard. When we cut it it would become crummy. Then as we opened the other we found some of it would be soft, which was very hard and difficult to cut.

Q. Did you make any further examination of the candy?

A. Not just then. I couldn't say, because we had opened a considerable amount of it which we found would become that way. Part of it was good, and the other part was just sticky. Then later we did.

Q. With reference to the candy that you describe as sticky, did you cut it?

A. We would cut it, but instead of putting it out in squares, like we usually do, in waxed papers, we would have to use little cups to put the candy in, because it was so sticky we couldn't handle it.

Q. Did you sell it in the cups?

A. Yes, we did.

Q. With reference to the date of the mark-down, did you make an examination of the fudge at that time?

A. Oh, yes, we made it at the time we took the

(Testimony of Frances Murrell.)

mark-down. [214] We also found it was in the same kind of condition. It would be hard, and others would be soft.

Q. Did you observe any mold on the candy at any time? A. Yes.

Q. When was the first time that you observed mold?

A. I would say it was approximately the 8th or 10th of January that we noticed that.

Q. That would be about the time that you made the mark-down.

A. That was just after we made the mark-down.

Q. Did you make any examination of the fudge at a later date?

A. Well, at the time that we found this was moldy that is when we went through every box of fudge that we had on hand.

Q. What did you find on making a complete examination of the fudge?

A. We found that it was moldy around the pecans on top, and also around the edges we would find it moldy. A great deal of it was still very soft. Most of it was all very soft, and we would find some was still hard, and would crumble if we had tried to cut it.

Q. At the time you made the mark-down did you have any of the Pan O' Butter Fudge in stock than that you marked down? [215] A. No.

Q. You returned part of the candy to the L. A. pool stock, did you not? A. Yes, I did.

Q. At the time you returned the candy to the

(Testimony of Frances Murrell.)

pool stock did you make any examination of the portion of the candy that you returned?

A. We again had to go over it, because we had instructions to do so, and we went through every box again, and I was there at the time every box was opened.

Q. With reference to the candy that was returned to the pool stock, what was the condition of that candy? A. It was very moldy.

Q. How many people did you have in the candy department during this Christmas period?

A. During Christmas time?

Q. Yes.

A. Altogether I had 10. I had four regulars.

Q. During the normal period of the year how many people do you have in the candy department?

A. Three.

Q. Where was your stockroom located?

A. My stockroom is on the fifth floor of the building.

Q. The candy was stored in that stockroom?

A. Yes. [216]

Q. How much would you take onto the selling floor during the course of the day?

A. Not more than 50 pounds at a time.

Q. With reference to the stockroom, where in the building was it located?

A. It's on the fifth floor, and it is near the south side where there are quite a few windows.

Q. Are those windows kept open?

A. Yes, most of them are.

(Testimony of Frances Murrell.)

Q. What was the condition with reference to the stockroom during the period of November and December and January, in this period in 1943 and '44?

A. Our stockroom is always kept in order.

Q. With reference to temperature.

A. It's very cool.

Mr. Wheeler: I have no further questions.

Cross Examination

By Mr. Rolston:

Q. Did I understand, Mrs. Murrell, the first time you noticed any mold was after the mark-down? A. Yes.

Q. Up to that time all the candy that you had in showed no mold at all?

A. Yes, that we had opened.

Q. Do you know how the merchandise was shipped down to [217] your store?

A. Yes, it comes by our Sears' Signal truck.

Q. Do you know whether or not that truck is refrigerated? A. That I could not say.

Q. Do you recall the size of the cartons that you handled, how heavy they were?

A. I'm not sure.

Q. Do you know whether or not the slab was a 9-pound slab or a 14-pound slab?

A. I believe the boxes and all would weigh about 18 pounds.

Q. How large is the candy stockroom where this was stored?

(Testimony of Frances Murrell.)

A. Oh, I would say it was about 8 by 12.

Q. Do you recall how high these cartons were stacked?

A. These cartons were stacked not more than five high, because of the shelves that we have in the stockroom.

Q. Was all of this fudge stacked on the shelves?

A. Yes.

Q. Did you have much other candy in the stockroom? A. No.

Q. That was the only candy that was in the stockroom?

A. No, that was not all that we had in there, but at that time our stock was getting very low.

Q. The girls did not like to handle this fudge, did they? A. No.

Q. It was a little messy to handle?

A. That's right.

Q. When you first noticed that some of the fudge was hard, did you notify Mr. Ashby?

A. Yes, he was notified.

Q. Did you notify him?

A. My merchandising man notified him.

Q. You told somebody to notify him, and that is as far as you know personally?

A. I know he notified him, because I had him talk to him over the telephone.

Q. Was Mr. Ashby notified of the soft condition of the candy as well?

A. Yes, at the same time.

Q. Do you recall, when you first examined it,

(Testimony of Frances Murrell.)

what proportion was good, what proportion was, as you call it, soft, and what proportion hard?

A. When we went over it?

Q. The first examination that you referred to.

A. The first time—do you mean all of it?

Q. No, what you examined of it.

A. What we examined when it first came in, we took in [219] about 10 or 20 of the cartons, and they were fine.

Q. The first 30 were fine? A. Yes.

Q. You used them all? A. Yes.

Q. That was the first time you examined them?

A. That was the first time, yes.

Q. That was on or about December 8th?

A. No, that was when it first came in.

Q. Didn't you testify it first came in on December 8th?

A. You asked me the first time I examined it.

Q. The first time you examined it they were all good? A. Yes, that's right.

Q. That was December 8th?

A. Yes, that's right. Pardon me.

Q. Did you sell all of the fudge you examined on that first occasion? A. Yes, we did.

Q. The only reason you used only 50 pounds per day, approximately, was because that was all you had calls for, is that right?

A. That's right.

Q. When did you start using these cups?

A. We started using them about the first of the year. [220]

(Testimony of Frances Murrell.)

Q. It was after Christmas? A. Yes.

Q. Had you taken any mark-down at that time?

A. No.

Q. These cups you have mentioned are just little candy paper cups, is that right? A. Yes.

Q. They are not drinking cups, or anything of that nature? A. No.

Q. Just a little piece of paper; you put an individual piece of candy in each paper?

A. That's right.

Q. And you sold that candy that way?

A. Yes.

Q. Did you sell all the soft candy you had that way? A. No.

Q. You sold a good portion of it?

A. No.

Q. Of all the candy that you used or examined up to January 10th you never discovered a moldy condition prior to that, is that right?

A. No, we did not.

Q. In other words, that statement is a correct statement; you did not discover any mold? [221]

A. That's right.

Mr. Rolston: That is all.

Mr. Wheeler: I have no further questions.

The Court: Call you next witness.

AMY WADE,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Amy Wade.

Mr. Wheeler: I offer retail requisition No. 130345, dated 11/15/43.

The Clerk: EE for identification.

Mr. Wheeler: And retail requisition, returned merchandise, No. 256410, dated 1/21/44.

The Clerk: FF for identification.

Mr. Wheeler: Mark-down form No. 736220, dated 1/12/44.

The Clerk: GG for identification.

Mr. Wheeler: Mark-down form No. 736221, dated 1/24/44.

The Clerk: HH for identification.

Direct examination

By Mr. Wheeler:

Q. Mrs. Wade, you are a resident of the City of Pasadena? [222] A. Yes, sir.

Q. You are employed as a candy division manager of the Sears-Roebuck and Company store, Pasadena? A. Yes, sir.

Q. How long have you been employed by that company? A. About six years.

Q. How long have you been employed as division manager? A. Almost two years.

Q. In the candy department? A. Yes.

Q. Had you had any previous experience with

(Testimony of Amy Wade.)

candy prior to your employment as division manager?
A. Yes, sir.

Q. What was that experience?

A. In our own business, from about 1929 to 1939.

Q. That is, in the retail candy business?

A. Yes, sir.

Q. Calling your attention to the period from November, 1943, to February, 1944, I will ask you if you had Pan O' Butter Fudge in the Pasadena store of the company?
A. Yes, sir.

Q. Showing you Defendant's Exhibit EE for identification, I will ask you if that is a record that is kept and maintained under your supervision and control?
A. Yes, sir. [223]

Q. What does that record reflect?

A. The receipt of 1960 pounds of Pan O' Butter Fudge.

Q. Does that reflect the date on which you received it?
A. Yes, the 18th of November.

Q. I show you Defendant's Exhibit FF for identification, and I will ask you if that record is kept and maintained under your supervision and control?
A. Yes, sir.

Q. What is that record?

A. This shows we returned 602 pounds to the pool stock at the request of Mr. Ashby.

Q. Does it show the date you returned it?

A. Yes, on the 24th.

Q. 1944?
A. Yes.

Q. Showing you Defendant's Exhibit GG for identification, I will ask you if that is a record that

(Testimony of Amy Wade.)

was maintained under your supervision and control? A. Yes, sir.

Q. What record is that?

A. We marked down 944 pounds of Pan O' Butter Fudge from 89c to 69c on the 8th day of January, 1944.

Q. Showing you Defendant's Exhibit HH for identification, I will ask you if that is a record maintained under your supervision and control?

A. Yes. That shows we marked down 14 pounds on January 24th, from 89c to 69c.

Q. I will ask you to examine it closely.

A. It shows marked down from 69 to nothing. It previously had been marked from 89 to 69.

Q. That particular record shows a mark-down of 14 pounds from 69c to nothing?

A. Nothing.

Q. On the 24th of January, 1944?

A. On the 24th of January, 1944.

Q. Mrs. Wade, with reference to the receipt of Pan O'Butter Fudge in the Pasadena store, did you make any examination of the fudge, or any part of it, at the time of its receipt?

A. I did.

Q. What examination did you make?

A. We went through our entire shipment.

Q. What did that examination show?

A. It showed that some of it, the boxes were wet and sticky on the outside. We opened them and found they were practically swimming in syrup. Others were dry, and had mold on them around the

(Testimony of Amy Wade.)

nuts, and around the edge of the cartons, some even were so hard and moldy you couldn't tell one slab from the other.

Q. What do you mean, you couldn't tell one slab from [225] the other?

A. Two slabs were packed in the boxes, and those two slabs were so melted together, and moldy, you couldn't tell but what it was all one slab.

Q. Did you sell any of the candy?

A. Yes, sir.

Q. Did you make a further examination of the candy?

A. We watched it all the time, because as we opened the shipments, as it came in, it looked like something was wrong; some of it was so soft it wouldn't hold its shape. We opened it, and tried to dry it. Some would dry, and some would continue to mold.

Q. Did you make any examination of the candy at the time you took the first mark-down, on January 12th?

A. Yes, we knew it was in poor condition.

Q. Did you make any examination of the entire amount of fudge at the time that you returned some of the candy to the pool stock? A. Yes, sir.

Q. What was the condition of the candy that was returned to pool stock?

A. Most of it was very hard and all moldy.

Q. With reference to the second mark-down, what was the circumstance with reference to that?

A. That was in such bad condition we thought

(Testimony of Amy Wade.)

we had [226] better throw it away than to even try to ship it back.

Q. That was about the time you took the other merchandise back to the pool stock warehouse?

A. Yes.

Q. Where was the storeroom in Pasadena, the candy storeroom?

A. In Pasadena it is located on the sixth floor.

Q. Where was it with reference to any sales area?

A. It's the first stockroom above the fifth floor, which would be the sales room.

Q. There is no sales area on the sixth floor?

A. No, sir.

Q. What was the situation in the stockroom with reference to temperature?

A. Our stockroom at this particular time of the year would average from 60 to 67 degrees.

Q. How many people did you have employed in the candy department during the Christmas period?

A. Four regulars; about six extra people.

Q. After Christmas, how many did you have employed? A. Four.

Mr. Wheeler: I have no further questions. You may examine.

Cross Examination

By Mr. Rolston:

Q. How large is the stockroom? [227]

A. It goes clear across the entire width of our building.

(Testimony of Amy Wade.)

Q. That is the candy room?

A. My candy stockroom goes across the entire sixth floor.

Q. It is separated from other parts of the stockroom by wire, isn't it? A. Yes.

Q. Open mesh wire? A. Yes.

Q. There are windows in the stockroom?

A. Yes, sir, there is a cross-section of air. There are windows on both sides.

Q. They open onto the storeroom as well as onto the outside of the building, is that correct?

A. That's right.

Q. How high were these cartons stacked in there?

A. As I remember they only stack about three cartons high.

Q. Did you individually inspect each and every carton that came in? A. I did.

Q. That was at the very beginning, the first day? A. Yes, sir.

Q. At that time you noticed that some was already moldy? [228]

A. Yes, sir.

Q. Do you recall the size of the cartons, that is, their weight? A. No, sir, I don't.

Q. Do you recall the weight of the slab? Was it a 9-pound slab or a 14-pound slab?

A. It wasn't 14. I couldn't give you the actual weight. I know there were two slabs to the box with a piece of waxed paper between.

(Testimony of Amy Wade.)

Q. Taking one slab at a time, do you recall whether it would be closer to 9, or closer to 14?

A. It would be closer to 9.

Q. The 14 pounds represented by the mark-down sheet HH, was that one piece, or several pieces?

A. I can't say about that; it has been too long ago; I have forgotten. As I remember it was parts of several.

Q. Do you recall how long that merchandise was in the sales department there? A. No, sir.

Q. Could it have been there more than a week?

A. I can't say about that.

Q. You don't recall how long it was there?

A. No, sir.

Q. Do you recall what the store temperature was? A. It averaged between 60 and 67.

Q. That's throughout the store?

A. My stockroom. I don't know what the sales floor is.

Q. You are in charge of the sales floor as well?

A. Yes.

Q. All the girls worked under your direction?

A. Yes.

Q. You had a little trouble with them, didn't you? They didn't like to handle this fudge?

A. Indeed we did.

Q. They did not like to get their hands dirty handling it, is that right?

A. That's right; their clothes as well.

Q. It was warmer in the storeroom than it was in the stockroom, however, wasn't it?

(Testimony of Amy Wade.)

A. Repeat the question again.

Q. It was warmer in the sales room than it was in the stockroom, wasn't it? A. Yes, sir.

Q. Did you report to Mr. Ashby this condition you found on November 18th? A. Yes, sir.

Q. You reported to him yourself?

A. Yes, sir.

Q. At that time you told him some of it was moldy? [230] A. Yes.

Q. Some of it was runny? A. Yes, sir.

Q. Some of it was hard? A. Yes, sir.

Q. Did he come over and see those samples that you had, of each condition?

A. I can't say about that. I don't remember.

Q. Do you know what proportion of the merchandise you examined was moldy?

A. I would say one-third.

Q. How much was hard?

A. Approximately one-third.

Q. How much of it was swimming in syrup?

A. In other words, what would be salable, I can't say the exact proportion of that. Some of it dried out; some didn't.

Q. When you first examined it some of it was already dry, wasn't it?

A. Yes, some of it was dry; some of it was salable, surely.

Q. Did you sell that dry fudge?

A. Yes, sir.

(Testimony of Amy Wade.)

Q. Did you sell the fudge that was swimming in syrup? A. No, sir. [231]

Q. Did you sell any moldy fudge?

A. No, sir.

Q. About how much was swimming in syrup, as you describe it?

A. I don't remember. I remember seeing several cartons just really soaked with syrup. I can't say how many pounds.

Q. Just a few?

A. Considerable; several packages.

Q. Did Mr. Ashby tell you to open the package, and let it dry out over night, and use it the next day?

A. He said to open it and let it dry.

Q. Did you do that? A. Yes.

Q. Did you use a portion of what you opened and dried?

A. Some we did; some we did not.

Q. The part that was dry you used?

A. Yes, sir.

Q. At the time of the first mark-down, which I believe was January 12th, according to Exhibit GG—that's the 994 pounds? A. Yes, sir.

Q. Was that all the stock you had on hand at that time? A. I believe so.

Q. After that time you sold some of that stock, didn't you? [232] A. Yes, sir.

Q. On January 24th, the amount specified on

(Testimony of Anny Wade.)

Exhibit FF that was returned to the pool, that was all the fudge you had left on hand?

A. Yes, sir.

Q. Was there any change in the condition of the fudge between the time you first examined it and January 12th, to your knowledge?

A. Some had mold. Even though we opened it to dry, it would have mold anyway.

Q. Some of it was dried out and used?

A. That's right.

Q. Did you report to Mr. Ashby from time to time as to any change of condition?

A. We did.

Mr. Rolston: That is all.

Mr. Wheeler: I have no further questions. Mr. Arnold.

WILLIAM L. ARNOLD,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: William L. Arnold. [233]

Direct Examination

By Mr. Wheeler:

Q. Do you have some records with you, Mr. Arnold? A. I do.

Q. Will you take them to the stand with you. Do you have a card similar to this, Mr. Arnold?

(Testimony of William L. Arnold.)

A. Yes, sir.

Q. I will take the original and and you take the copy. This is marked Bower-Giebel Co. It does not appear to have any date. It is headed "Department 8708. Stock No. 87 P. C. 103".

The Clerk: II for identification.

Q. By Mr. Wheeler: I show you Defendant's Exhibit II for identification, and I will ask you if that is the record of the company which is prepared and maintained under your supervision and control? A. It is.

Q. What is that record, Mr. Arnold?

A. It is what we call the stop record, a record of inventory, from which we maintain perpetual inventory.

Q. What is your position with the company?

A. Stock merchandise manager of the L. A. pool stock.

Q. Your office is situated in the L. A. pool?

A. That's right.

Q. How long have you been in that position?

A. I have been in that particular position a year and nine months.

Q. How long have you been with the company?

A. Almost nine years.

Q. With reference to this card, will you explain the method of preparing it?

A. The first we do, when a source is established for any commodity, we have four separate postings, at the upper lefthand corner of the card, which indicates the company or the source; in this

(Testimony of William L. Arnold.)

case the Bower-Giebel Company was listed under source A, indicating the factory cost in the unit, the discount, either net, cash, f.o.b. Point, and transportation allowance. In the upper righthand corner we identify the particular merchandise, and the division, which is 87 P.C. 103.

Below that we indicate the amount, giving the description. In the lefthand side of the card is a space for our orders, which we place, indicating that order No. 407215 was placed with source A, Bower-Giebel Company, on October 20, 1943, to be shipped on November 5th, and the amount of the order was 28,000 pounds.

Q. That information was prepared from a purchase order, a copy of which purchase order I have handed to you?

A. The purchase order which was sent to me by Mr. Ashby's office. [235]

Q. Then, after the receipt of this purchase order and the setting-up of the card, what record would be maintained on the card?

A. The receipt and disbursement of all commodities are maintained on such stock record cards.

Q. What was the procedure involved in setting up the record of receipt and disbursement?

A. I will take the disbursement first. Disbursement was handed to us, or passed on to our office by Mr. Ashby's office on a form setting up each store, and indicating the quantity of pecan chocolate fudge to be disbursed to each particular store.

(Testimony of William L. Arnold.)

A requisition form was created by Mrs. Feverly, the stock record clerk.

Q. What form number?

A. The form number is the requisition number on which all shipments are made out of pool stock.

Q. That is something that does not appear here?

A. It is made up from this allocation sheet handed to us by Mr. Ashby, which was created by Mrs. Feverly out of this allotment allowance, which was created and disbursed, so far as the sheets are concerned, November 13th. In other words, we made all requisitions on this day.

Q. When the merchandise was received would its receipt be noted on this card?

A. Yes, sir, in the column headed "Receipts", which [236] indicates the first shipment was received 11/16; amount 1680.

Q. The column appearing on the card headed "Orders", what does that reflect?

A. The lefthand side of the card?

A. Yes.

A. That is the information from the original purchase order 407215, and from that, reading down from top to bottom, 11/16, and under "Routing" appears the number 4257, and taking the receipt of 1680 and deducting it from 28,000 leaves 26320, and each subsequent receipt is noted in the same manner indicated.

Q. And the dates listed under "Receipts" shows the quantity received on that particular day?

A. I wouldn't say on that particular day. It's

(Testimony of William L. Arnold.)

the day we checked the merchandise in. The merchandise, I would say in almost 100 per cent of the cases, is received a day prior to the day shown on this card, but in no instance more than one or two days' difference between the date of receipt in the warehouse and the date the entry is made on the card.

Q. Would you have a record which would show the date received?

A. I do; each and every receipt of each and every shipment. [237]

Q. Will you examine the first document that you have that shows the date of receipt? The first item listed under "Receipts" on this card is——

A. 1680 pounds.

Q. That was received in the L. A. pool stock November 15, 1943. The second item, 3096 pounds?

A. There was some controversy with reference to this particular shipment, inasmuch as our invoice called for 108 cases, 28 pounds to the case, and 56 cases, 18 pounds to the case, and there was actually received 72 cases, 28 pounds to the case, and 60 cases of 18 pounds to the case, or there were over-shipped four cases of the 18-pound shipment, and we were short 36 cases of the 28 pounds to the case. The order was short 936 pounds against the billing.

Q. What is shown as the date of receipt?

A. The date of receipt 11/17/43.

Q. Can you tell me what was the date of receipt for the next item, which is 2800 pounds?

(Testimony of William L. Arnold.)

A. The 2800 pounds was received 11/17/43.

Q. The next item, which is 4446 pounds?

A. Received on 11/22/43.

Q. And the next item which is 1188 pounds?

A. Was received 11/23/43.

Q. The next item, 4140 pounds?

A. Received on 11/24. [238]

Q. The next item, which is 3060 pounds?

A. Was received 12/3.

Q. The next item which is 4068 pounds?

A. Was received 12/4.

Q. The next item which is 1314 pounds?

A. Was received 12/4.

Q. The next item which is 4140 pounds?

A. Was received 12/4.

Q. Now, with reference to the column of figures that appear on the card marked in red, what do those figures reflect?

A. At the lower lefthand corner?

Q. Yes.

A. Those are the retail returns, or what we call R.M.R. They are carried on the same form as the Retail Store requisition, on which shipments are made on the form, but they are indicated usually as returned merchandise. The second column shows the dates they were received; the third column is the quantity, indicating the store number immediately above the quantity, in one column, and then again in the current and cumulative, from top to bottom.

Q. The column figures in red which commences

(Testimony of William L. Arnold.)

with the first red figure 888279, under "Average", what do they show?

A. They are the R.M.R. requisition number under which it was returned to pool. [239]

Q. Do you have the records that you maintain under your supervision and control that reflect the date of shipment of merchandise to the various stores?

A. Yes, sir.

Q. In what form are those records?

A. They are in a form of what we term as drivers' sheets. We have inter-van service between the L. A. pool stock and the various local stores which move on regular set schedule every hour, every two hours, depending upon the store. The sheets are all numbered, made in duplicate, and the original copy of the drivers' sheet accompanies the load to the respective stores. It is signed for by the receiving clerk in that particular store. The duplicate we keep in the files, and it becomes a permanent record.

Mr. Wheeler: I will ask that this be marked JJ for identification.

The Clerk: JJ for identification.

Q. By Mr. Wheeler: This is headed "Pecan Chocolate Fudge" dated 1-8-44. I show you Defendant's Exhibit JJ for identification, and I will ask you, Mr. Arnold, if you prepared a summary from the records that you maintain under your direction and supervision?

A. I prepared this report, yes, sir.

Q. And that is an accurate summary of the

(Testimony of William L. Arnold.)

transactions reflected by those records that you maintain? [240]

A. It is a record reflected from taking the information contained in these drivers' sheets or load sheet.

Q. And you prepared this summary?

A. I did.

Mr. Wheeler: This is an exhibit entitled "Pecan Chocolate Fudge" 1-8-45, with the pencilled notation "In Coming or Returns".

The Clerk: KK for identification.

Q. By Mr. Wheeler: I show you Exhibit KK for identification, and I will ask you if that is a summary of the information with reference to returns of the pecan fudge to the pool stock store?

A. It is.

Q. Was this prepared by you? A. It was.

Q. From records you maintain under your supervision and control? A. Yes, sir.

Q. That you have available here?

A. Yes, sir.

Q. With reference to Exhibit for identification JJ, does this exhibit show each of the stores to which merchandise, pecan chocolate fudge, was sent?

Q. Does it show the date shipped? [241]

A. It does.

Q. The quantity shipped? A. It does.

Q. The number of cartons? A. Yes, sir.

Q. And the requisition number?

A. Yes, sir.

Q. With reference to Exhibit KK for identifi-

(Testimony of William L. Arnold.)

ation, does it show the stores from which it was returned? A. It does.

Q. The requisition numbers covering the return? A. R.M.R. numbers, yes, sir.

Q. The quantity returned?

A. That's right.

Q. And the date of return?

A. That's right.

Q. That would be the date that it was received in the pool stock warehouse? A. Yes, sir.

Q. When this fudge would be received in the pool stock what would be its handling, Mr. Arnold?

A. The original shipment, or the return shipment or the return shipment?

Q. The original shipment.

A. The original shipment is delivered to our receiving dock, which is on the west end of our building, and is given [242] an in freight number, typed from the driver's sheet, handed up by the trucking company, and from there it is immediately dispatched to the east end of the building, which is our disbursing center for this type of merchandise. We keep this type of merchandise, sundry items, such as candy and knit goods, and small items, all in the miscellaneous division 80, and from that they are distributed to the various stores or respective divisions.

Q. Is the candy stored in the warehouse, or in the pool stock warehouse between the time of receipt and transshipment to warehouse or stores?

A. Just long enough for us to re-label the mer-

(Testimony of William L. Arnold.)

chandise and dispatch it on the inter-store vans, depending on the manpower available at that particular time.

Q. What is the period of time involved?

A. It usually takes one to two days; not over three days.

Q. When the candy was returned, what was its handling?

A. Well, to insure that no pilferage would take place when the candy came back, we put it in what we call our fur room. That was a room that was not being used at that particular time, due to the fact that fur storage does not start until the summer months. We placed this candy in this room, more so to keep anyone from pilfering than anything else. [243]

Q. Do you still have the candy at the pool stock?

A. I do.

Q. Have you made any examination of its condition? A. Several times.

Q. What was the examination you made? When was the first time you made an examination?

A. The first time I made the examination was at a time I think when all the stores' returns were in with the exception possibly of San Diego. At that time we had stored all of the candy in this fur room. Mr Theaker was there. I don't recall whether Mr. Ashby was there or not; but they came over to the warehouse. I obtained the key from the office, and went over and unlocked the fur room

(Testimony of William L. Arnold.)

so that we could go in. That was the first time I examined the candy, or any part of it.

Q. What examination did you make at that time?

A. We opened, I don't know how many cartons; there were several of them, but some were soft, mushy, and others were hard, and they were most all moldy.

Q. Did you make any further examination of the candy?

A. Yes, I have, several times.

Q. What has been the condition at the times of the subsequent examinations?

A. Just got worse and worse, and now they are not only moldy, but they have a lot of worms in them. [244]

Q. You brought down two boxes of the fudge?

A. I brought down one 28-pound carton and one 18-pound carton.

Q. Those are the two cartons on the desk?

A. They are.

Mr. Wheeler: If your Honor please, I think it would probably just add work to the clerk's office——

The Court: You can describe them; not introduce them into evidence, but just exhibit them and describe them.

Mr. Rolston: Furthermore, I think it is objectionable, and it will have no tendency to show the condition.

The Court: Of course, it is rather remote.

(Testimony of William L. Arnold.)

Mr. Rolston: It is extremely remote.

Mr. Wheeler: It was not with reference to the condition of the fudge; it was as to the box itself.

The Court: I don't think it is material. It has been described sufficiently.

Mr. Wheeler: There was one point, your Honor. There has been some testimony to the effect, I think Mr. Pocius testified that they were not stacked more than five cartons.

The Court: What do they show?

Mr. Wheeler: They don't show anything.

The Court: He said five or seven.

Mr. Rolston: I believe he said seven.

Mr. Wheeler: Whatever his testimony was.

The Court: You gentlemen can agree to what they show. If they don't show anything, it is negative testimony. What do they show?

Mr. Wheeler: They don't show anything on the sides.

The Court: I don't think you need bother, because the condition at the present time would not be very material, because it is pretty remote. They have been taken out of the circulation, and it is quit remote at the present time. Even the best of the fudge is spoiled right now, a year after.

Mr. Wheeler: At this time I offer the exhibits marked for identification.

The Court: They will be received, under the rule of summaries made from books, the originals of which are in court subject to inspection by opposing counsel.

(Testimony of William L. Arnold.)

Mr. Wheeler: That is correct. II, JJ and KK.

The Court: All right.

Mr. Wheeler: I have no further questions. You may examine.

Cross Examination

By Mr. Rolston:

Q. Mr. Arnold, are you familiar with the trucks or vans they use? A. I am, yes.

Q. Are they refrigerated?

A. They are not. [246]

Q. Was the pool stockroom refrigerated?

A. The fur room, the main fur room, is not refrigerated.

Q. Is the rest of the stockroom refrigerated?

A. No, the warehouse doesn't need refrigeration during the winter months. From now on it's a pretty cool warehouse.

The Court: What would you say would be the average temperature?

A. The average temperature is anywhere from 50 to 65 degrees.

The Court: It wouldn't be comfortable?

A. It wouldn't be comfortable to walk around during this time of the year. It is 850 feet long.

The Court: It is open?

A. Yes; shipping doors on one side and shipping doors on the other, and the west end is open?

Q. By Mr. Rolston: This fur room has a mothball odor to it?

A. I don't know whether it does.

Q. Naphthalene?

(Testimony of William L. Arnold.)

A. I don't know whether it is naphthalene, or what it is, but there is an odor in there, but the candy was not stored in the room until it was returned from the store.

Q. I just wanted to know. [247]

A. There is a definite naphthalene odor in there, or an odor pertaining to furs, and keeping moths out of furs.

Mr. Wheeler: At this time, before resting my case, I would like to offer for introduction into evidence each of the exhibits that have been referred to by the various witnesses as being company records maintained under their supervision and control.

The Court: Where do they begin, Mr. Somers?

The Clerk: I haven't the entire list with me.

The Court: They are sufficiently identified as being the various documents as to which the various managers testified. The witnesses used them merely to refresh their recollection, and I don't think there can be any objection to having them received into evidence. They will be received in evidence.

Mr. Rolston: They start with E.

Mr. Wheeler: At this time the cross-complainant rests.

(Short recess.)

Mr. Rolston: If the court please, there is one witness, Mr. Erhart, whom I would like to recall for cross examination under the counter-claimant's case. Mr. Wheeler has no objection.

The Court: All right. [248]

ALPHONSE ERHART,

recalled.

Further Cross Examination

By Mr. Rolston:

Q. Mr. Erhart, on the occasion that you went over to see Mr. Ashby at his office, in the latter part of November, you examined several cases at that time, I believe? A. That is correct.

Q. Did you notice any mold on any cases whatsoever? A. Not at that time.

Q. Did Mr. Ashby talk of any mold at that time? A. Not that I recollect.

Q. Did he talk of any hard candy at that time?

A. The discussion was mainly about the moisture of the fudge. It was on his statement that I made the recommendation.

Q. That was the only point that Mr. Ashby brought up, or the only statement concerning the fudge at that time?

A. To my memory, yes.

Q. During that conversation did you in any way tell Mr. Ashby that he should proceed to use as much as he could, and Bower would make good any defective or any unsaleable merchandise that remained?

A. Definitely not. We went over that yesterday.

Mr. Rolston: That is all. [249]

Redirect Examination

By Mr. Wheeler:

Q. Mr. Erhart, during the course of the conversation Mr. Ashby told you that he would con-

(Testimony of Alphonse Erhart.)

tinue to use the merchandise, and there might be an adjustment later?

A. As I recall the conversation, Mr. Wheeler, Mr. Ashby stated to me that he was going to follow my recommendation. I do not recall any conditions that he made upon it, but he did suggest he was going to follow my recommendation and attempt to use the fudge.

Mr. Wheeler: I have no further questions.

Mr. Rolston: At this time, your Honor, I wish to enter a motion that the counter-claim has not been proven; that there is no sufficient proof; that counter-claimant by his own testimony has clearly indicated that he had bought the merchandise; that he advised Mr. Bower that he was going to stop payment of the order, and recommended that Mr. Bower stop his checks. Thereafter he decided he could use the fudge, and he was going to pay the invoices; and, further, that Mr. Bower could release his checks at that time, completely taking off any previous warranties. He had full knowledge at that time of all alleged defects of the fudge, and every store reported to him every detail.

The Court: The motion will be denied.

Mr. Rolston: I will call Mr. Mitchell. [250]

R. E. MITCHELL,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: R. E. Mitchell.

Direct Examination

By Mr. Rolston:

Q. Mr. Mitchell, what is your business or occupation? A. I am a food broker.

Q. Do you specialize in candy?

A. Candy and specialty foods.

Q. For how long have you been following that occupation? A. About 14 years.

Q. During the 14 years you have sold a great deal of bulk candy?

A. From time to time, yes.

Q. Also other types of candy as well, of course?

A. Yes.

Q. Are you familiar with fudge in particular, in any respect?

A. I don't believe I can answer that yes or no.

Q. You have had some dealings in fudge, though? A. Yes.

Q. In addition to this particular transaction?

A. Yes.

Q. Over a period of years? A. Yes.

Q. You were present, I believe, at a conversation in Mr. Bower's office the latter part of October, I believe October 20th, at which Mr. Erhart, Mr. Bower, Mr. Ashby were present? A. Yes.

(Testimony of R. E. Mitchell.)

Q. During the course of that conversation did Mr. Bower make any warranties of any type or description?

Mr. Wheeler: I object to that as calling for the conclusion of the witness as to what are warranties.

Mr. Rolston: I will withdraw the question.

The Court: I think that calls for a conclusion.

Q. By Mr. Rolston: Will you relate the conversation?

The Court: Besides, under the Civil Code, food and edible articles are warranted fit for consumption. The Supreme Court has so held.

Mr. Rolston: There is no doubt about that.

The Court: Anything that is moldy is not fit for human consumption. I will sustain the objection, because it calls for a conclusion.

Q. By Mr. Rolston: I will ask another question: Just relate the conversation, to the best of your recollection. [252]

The Court: That question is all right.

A. On the date in question, approximately October 20th, my associate, Mr. Erhart, and myself called on Bower-Giebel Wholesale with a sample of this Pan O' Butter Fudge. At that time we explained the fudge to Mr. Bower, along with the price and the approximate quantities that we thought we could obtain. Mr. Bower said—

Mr. Wheeler: I object to the conversation as between Mr. Mitchell and Mr. Bower, inasmuch as it does not appear Mr. Ashby was present.

A. How can I tell it in my own way unless I

(Testimony of R. E. Mitchell.)

tell it just the way I am doing. I am just trying to repeat the conversation, as nearly as I can remember.

The Court: That is enough.

Q. By Mr. Rolston: Was Mr. Ashby present during that portion of the conversation?

A. No, sir.

Q. Try and confine the conversation to the time after Mr. Ashby got there.

A. After about an hour or so had passed Mr. Ashby arrived. I don't believe I had ever met Mr. Ashby before. Mr. Bower introduced Mr. Ashby to Mr. Erhart and myself. Mr. Bower then related to Mr. Ashby what Mr. Erhart and I had told him in regard to the fudge.

Mr. Wheeler: May we have the conversation; what he said? [253]

Q. By Mr. Rolston: To the best of your recollection relate some of his statements to Mr. Ashby.

A. As I recall, Mr. Bower said to Mr. Ashby: "I explained to these gentlemen that I knew nothing about fudge; that I was calling someone on the outside for an opinion as to what I should do." Mr. Bower told Mr. Ashby that the fudge cost 50c a pound; that there could be approximately 200,000 pounds of this fudge obtained. Mr. Ashby tasted and sampled the fudge; asked some questions regarding the OPA ceiling concerning it. Mr. Bower then asked Mr. Erhart and myself to explain what we knew regarding the OPA. We told him that we thought the OPA ceiling could be established.

(Testimony of R. E. Mitchell.)

Then Mr. Ashby made some remarks concerning the general condition of the fudge as to how it could be changed to improve the sale of it in his stores. He asked if additional pecans could be placed on the top of it; also, if some pecans could be ground and put throughout the fudge. Either Mr. Erhart or myself answered and said that we thought that could be done. As a recall, he also preferred the fudge to be of a lighter chocolate color. I believe originally the sample was a little darker than Mr. Ashby preferred.

There was also some conversation regarding if a little white doily could be placed on top of each slab. To all of these requests by Mr. Ashby Mr. Erhart and I answered to the [254] best of our knowledge we thought these things could be complied with, and that one of us would go to Chicago in an effort to have the fudge on the basis that he wanted it.

Mr. Bower and Mr. Ashby had a conversation regarding the price that Mr. Ashby would pay for the fudge. After they arrived at the price Mr. Ashby then gave Mr. Bower a purchase order for 28,000 pounds of fudge, and said that he could sell considerably more than that. I believe he remarked that he could sell it as fast as we could ship it. And Mr. Bower then turned to Mr. Erhart and myself and placed an order for 200,000 pounds of fudge; gave me a check for \$7,000 as a good-will gesture on his part. We all thanked each other.

(Testimony of R. E. Mitchell.)

That was about the size of it. We were all very happy.

Q. Did you go back to Chicago, Mr. Mitchell?

A. Yes, sir.

Q. You discussed this matter with Mr. Pocius in Chicago? A. Yes, sir.

Q. Subsequent to that the shipments started to come out, did they, to Los Angeles, to Bower-Giebel? A. Will you repeat the question?

Q. Subsequent to your arrival there shipments started to be made to Los Angeles?

A. Not immediately upon my arrival, no. [255]

Q. But a short time thereafter?

A. After considerable conversation over the phone between Mr. Bower and myself shipments finally started.

Q. Did you also airmail a sample of the new formula? A. Mr. Pocius did.

Q. You know that of your knowledge that he did?

A. I did not see him put it on the plane.

The Court: The testimony shows it was received.

Q. By Mr. Rolston: Did you sample the shipments that were made to Los Angeles, in Chicago, before they were made? A. Some of them.

Q. Were the samples you examined, in your opinion, equal if not superior to the sample that was in Mr. Bower's office on that day, October 20th?

A. They were superior to the original sample.

(Testimony of R. E. Mitchell.)

The Court: In that they contained more nuts, is that right?

A. It was a better fudge, your Honor, all the way through. The shipments that were made were on a par with the second sample that was shipped, and there was considerable difference in the eating quality of the two pieces.

Q. When did you have your next conversation with Mr. Ashby, Mr. Mitchell?

A. Well, at one time I tried to sell Mr. Ashby some [256] candies. That had no bearing on the fudge.

The Court: We are not concerned with that.

A. That was the next conversation with Mr. Ashby.

Q. By Mr. Rolston: During that conversation was the fudge mentioned at all?

A. Not to my recollection.

Q. Was that during the month of December?

A. Yes, sir.

Q. That was before Christmas?

A. Yes, sir.

Q. When did you next have a conversation with him after that concerning the fudge?

A. At the time Mr. Erhart and I called on Mr. Ashby. I believe the date was January 12th.

Q. You had a conversation at Sears, Roebuck with Mr. Ashby and Mr. Erhart at that time?

A. Yes, sir.

Q. Did you examine any fudge?

A. Yes, sir.

(Testimony of R. E. Mitchell.)

Q. About how many cases did you examine?

A. 15 or 20.

Q. What was the condition of it?

A. Extremely hard, and a tendency toward molding on part of them. Part of them were in salable condition.

Q. Were any of them still in a moist condition?

A. Do you mean overly moist?

Q. Yes, at that time? A. No, sir.

Q. Of those 15 and some odd cases you examined did you find a high proportion of mold or low, in your opinion?

A. The general percentage of the trouble with the fudge that we inspected at that time was a baked, dried-out, hard condition.

Q. Did you have a conversation with Mr. Ashby at that time concerning the matter?

A. Yes, sir.

Q. During the conversation did you make any such statement as: "I would not have believed it possible if I hadn't seen it with my own eyes"?

A. Yes, sir.

Q. You did make such a statement?

A. Yes, sir.

Q. With relation to what did you make that statement to him?

A. I couldn't understand why the fudge was in that condition.

Q. What would normally cause that condition of the fudge? A. Heat.

(Testimony of R. E. Mitchell.)

Mr. Wheeler: Just a minute. I object to that. No [258] proper foundation for this witness.

Mr. Rolston: I believe I have shown he is an expert.

The Court: I will overrule the objection. Go ahead.

A. I was amazed, because normally if merchandise was kept properly it would not be in that condition in that short period of time. I couldn't understand why it was. I would not have believed it if I hadn't seen it with my own eyes.

Q. By Mr. Rolston: What elements would enter into the fudge becoming in that condition, this particular fudge that you saw at that time, and saw the sample of?

A. If the fudge had been allowed to remain in contact with the air over a long period of time before it was sold that would happen, especially if it was an average, fairly warm, temperature.

Q. Would you say 67 degrees was a fairly warm temperature, so far as preserving fudge was concerned? A. Yes, I would.

Q. Of these cases that you examined, were they 28-pound cases or 18-pound cases, as you recollect?

A. I believe—I am not sure, but I believe there may have been one or two 14-pound slabs, but the majority were 9-pound slabs; two to a case.

Q. During that conversation did Mr. Erhart make the following statement: "In most cases I will argue with the [259] buyer, but here the buyer has a real kick coming"?

(Testimony of R. E. Mitchell.)

A. I don't recall any statement of that kind.

Q. Do you recall any statement during the conversation in which Mr. Erhart made the following statement: "Bower will have to see this, because he will have to stand at least part of the loss"?

A. I don't believe Mr. Erhart said that.

Q. You have no recollection of such statement?

A. I don't recall that statement.

The Court: These boxes you examined had not been opened? You opened them to examine them, isn't that true?

A. No, there were a considerable amount there that had been opened.

Q. Some had been opened? A. Yes.

Q. Did you find the same condition in those that had been exposed to the air as in those that you opened?

A. The ones that had been exposed to the air were all as hard as a brick, whereas the ones that had not been opened, you would find one that was good, and one that was bad.

Q. By Mr. Rolston: Those that had not been opened, there was no sign of mold, was there?

A. I beg your pardon?

Q. Of those that were unopened prior to your opening [260] them there were no signs of mold inside, were there?

A. No; of some that were opened there was a tendency for mold around the nuts.

Q. In your experience with fudge is there any

(Testimony of R. E. Mitchell.)

difference in the handling of an expensive fudge and an inexpensive fudge?

Mr. Wheeler: If your Honor please——

The Court: I don't know that he was qualified as an expert. He is a broker. He is not shown to have been a retailer, or to have had any experience in preserving food.

The Witness: Your Honor, I think I can answer that question in such a way that you can understand it.

The Court: That is not the point. If he has experience along that line they ought to qualify him. So far all I know is that you are a broker.

Q. By Mr. Rolston: In the course of your brokerage business you have had an opportunity to examine the retailing of fudges?

A. It would take a few words to explain just what I mean on that.

The Court: All right.

A. In my type of work, and the type of outlet that I call on in the normal course of events they would not sell a 90-cent fudge. The type of outlet that would sell 90-cent fudge, in the normal course, would be a concern like Albert [261] Sheetz, or Martha Washington, and the type of concern that I would call on would sell that fudge. I used to sell fudge at 8c a pound. That is the type of fudge concern I called on; it wouldn't be 90-cent fudge.

Q. Is 90-cent fudge more perishable than a cheaper fudge? A. Yes, sir.

(Testimony of R. E. Mitchell.)

Q. In your opinion what is the maximum length of time that 90-cent fudge should be kept?

A. It would depend entirely upon whereabouts it was in the store and the condition it was kept under. 90-cent fudge should have cream and butter, and things of that nature in it which we all know are perishable.

Q. Did the Pan O' Butter Fudge the Karmelkorn Kommissary shipped to Los Angeles have cream and butter in it?

A. The ingredient label read that it had cream and butter, if I remember correctly. They couldn't use the word "butter" if it did not have it. It would be against the pure food law.

Mr. Rolston: You may cross-examine.

Cross Examination

By Mr. Wheeler:

Q. Mr. Mitchell, how long have you known Mr. Bower? A. I first met Mr. Bower in 1940.

Q. How long have you done business with Mr. Bower? [262] A. Since that date.

Q. Mr. Bower at the present time, and for some time past, has been one of your major accounts, has he not?

A. He is a good account, if that is what you mean, but I have a lot of other good accounts, too. He is only one of a couple of hundred.

Q. With reference to the volume of purchases Mr. Bower makes, doesn't he purchase a higher volume than most of your customers?

(Testimony of R. E. Mitchell.)

A. I have jobbers within two blocks of him that buy more.

Q. What would be the amount of business that Mr. Bower does with you within a period of a year?

A. I might do \$50,000 a year with him; maybe not that high. I would have to take the actual figures from the records.

Q. With reference to the conversation that you had with Mr. Bower's office on October 20th, you stated that there was a discussion with reference to the OPA price ceiling? A. Yes, sir.

Q. Did that discussion involve the prices at which other stores were selling that merchandise?

A. My recollection of that conversation, Mr. Wheeler, was that both Mr. Ashby and Mr. Bower said that they would have no part of it unless it satisfied the requirements of the OPA. [263]

Q. But specifically weren't certain stores and the price at which this fudge was being sold discussed?

A. If I understand you correctly, do you mean was the plants and places where this fudge was being sold discussed?

Q. That is correct.

A. At that time this fudge was not being sold in Los Angeles any place.

Q. But in other areas it was being sold, was it not? A. In other areas?

Q. Yes.

A. Yes, it was being sold in other areas.

(Testimony of R. E. Mitchell.)

Q. As a matter of fact, weren't the prices at which this candy was being sold in other areas mentioned during the period that you were discussing, of the OPA regulation?

A. I would imagine that it was, yes, or it would be normally.

Q. As a matter of fact, wasn't the price at which this candy was being sold at Marshall Field mentioned?

A. I don't believe at that time, no.

Q. At Montgomery Ward, in Denver?

A. Not at that time, no. My recollection is that came up later. That came up after I went to Chicago, when Mr. Ashby and Mr. Bower stopped payment on his check for \$7,000, because they were afraid it was not going to satisfy the OPA. At that time the records of other stores [264] were dug up.

Q. And it was being sold at other stores?

A. Yes.

Q. At prices exceeding 89c?

A. It may have been 90c. I don't remember it being over 90c.

Q. As a matter of fact, don't you recall in some of the stores it was being sold at a dollar a pound?

A. I don't recall the figure of a dollar. That's a very poor price.

Q. Either 99c or \$1.01?

A. Just a flat dollar is rather an unusual price.

The Court: I don't know why that cent off

(Testimony of R. E. Mitchell.)

means anything. It must be some psychology of selling.

Q. By Mr. Wheeler: Mr. Mitchell, when you state that these boxes that you examined when you went over to see Mr. Ashby on January 12th were opened, just what was their condition? What do you mean by opened?

A. As I recall, Mr. Wheeler, the main reason that I remember that they had been opened had been the manner in which they had been opened. In other words, when they opened the cases, instead of taking a little pains and effort to not wreck the box, they had been very careless in their opening of it. At that time the remark was made to Mr. Ashby when they were opened it would be much nicer to open [265] it in the manner it had been sealed; not like a carton.

Q. How had it been sealed?

A. In corrugated boxes. As you know, they come together, and there is a label pasted over the top of it, and by taking a knife and cutting down that label it opens up, and your carton remains intact.

Q. How had they been opened?

A. They had been opened from the back.

The Court: Somebody just ripped them open?

A. They had been just ripped open, that is correct.

Q. By Mr. Wheeler: You say they were opened from the back?

A. Yes.

(Testimony of R. E. Mitchell.)

Q. As a matter of fact, Mr. Mitchell, don't these boxes open from the back; in other words, aren't these boxes made so that the fold comes together on the back, and not in front, under the label?

A. That may be possible. They weren't opened in such a manner as to preserve the carton.

The Court: In other words, a man could have taken them and opened them and they would not have been noticeable?

A. Yes.

Q. Instead of that, he just ripped it open?

A. That's right. It might have been the top or back; I don't recall. [266]

Q. By Mr. Wheeler: How many cartons that you examined had been opened?

A. Mr. Wheeler, there were a number of cartons lying around the stockroom. I did not count them at that time, and to remember the actual number would be pretty hard. Maybe six or seven or eight; something like that.

Q. As a matter of fact, Mr. Mitchell, weren't the cartons that had been opened stacked together?

A. I really don't remember whether they were or whether they weren't.

Q. You don't recall whether these cartons that had been opened were taken from a particular place, or not? A. I really don't remember.

Q. You did examine a number of cartons that had not been opened? A. Yes, sir.

Q. And there was no question of the sealing of the package in those cases?

(Testimony of R. E. Mitchell.)

A. None whatever.

Q. And among the cases that you did open for the first time there were hard slabs of candy?

A. Yes, I believe there were a few that were as hard as a brick.

Q. Those cases that had been opened that you observed,—was the cover of the box placed over the fudge? [267]

A. Repeat the question again, please.

Q. As to the cartons of candy which you describe as having been opened before you examined them, as to those cartons was there any carton over the fudge?

A. If I understand you correctly, you mean had the boxes that had been opened, had they been put back into the box with their original covers placed on them, as they were before opening?

Q. That is correct. A. No, sir.

Q. Did it have any carton over it?

A. The fudge, as I recall, had been packed with two 9-pound slabs to a carton, and I believe each slab was packed in a very frail, thin cardboard box inside of the original carton, and the ones that had been opened were opened with the top of the outside box gone.

Q. They were still wrapped in waxed papers?

A. No, sir, the paper had been torn off as nearly as possible to see what was inside of them. In other words, they tore them to see what was there, and then set them aside, and would go to another one.

(Testimony of R. E. Mitchell.)

Mr. Wheeler: I have no further questions. [268]

Redirect Examination

By Mr. Rolston:

Q. During the conference with Mr. Ashby did you make any suggestion regarding any cut of price to dispose of the fudge that had not had any mold on it? A. Yes, sir.

Q. Would you relate that portion of the conversation, to the best of your recollection?

A. As we were walking out of the stockroom towards Mr. Ashby's office I suggested to Mr. Ashby that he further reduce his sales price and move the balance of the fudge as rapidly as possible in order to reduce any loss that might occur to the lowest possible amount; Mr. Ashby replied that Sears, Roebuck had already reduced the profit that they were making on the fudge by 20c a pound, and it was not Sears, Roebuck's policy to either sell merchandise at a loss or without a profit. That ended the discussion.

The Court: What do you mean, 69c?

A. Yes, from 89c to 69c, and they weren't interested in taking any further loss, and they would rather throw the whole thing away, or what had to be done. In other words, they had already shown a loss of 20c on their books.

Q. By Mr. Rolston: I believe you were present in Los Angeles, were you not, when Mr. Pocius and Mr. Bower made a certain adjustment of the fudge? [269]

(Testimony of R. E. Mitchell.)

Mr. Wheeler: I object to that as not proper redirect.

The Court: I want to be reasonable. If you overlooked something, go ahead.

A. Yes, sir.

Q. By Mr. Rolston: You were present during the conversation as to that adjustment?

A. Yes, sir.

Q. Do you recall the main factors that were considered in reaching the adjustment?

Mr. Wheeler: If your Honor please——

The Court: I think that is a general conclusion. I think he ought to state the conversation. It is an important conversation, and we ought to hear his version of what he heard of it.

The Witness. Do you want it in my own words?

The Court: Yes, go ahead, if counsel wants it.

Mr. Rolston: Yes.

A. That is kind of hard to do. I will try as near as I can.

The Court: Go ahead.

A. Mr. Bower had wired Pocius stopping shipment.

The Court: And he came out here. Let us start where you met him at Bower's. Let us start with the conversation there.

A. Mr. Pocius and I went into Bower-Giebel, and called [270] on Mr. Bower. Mr. Pocius was interested, and wanted to settle or collect the amounts of the past due invoices, that Mr. Bower had not paid. There was a discussion with Mr.

(Testimony of R. E. Mitchell.)

Bower as to why these invoices had not been paid. Mr. Bower told Mr. Pocius that he had not paid for those invoices because there had been a considerable amount of this fudge sold in this territory; it was now after Christmas, and he had quite a large stock in his warehouse, and the fudge was in a wet, moist, sticky condition; that he did not feel he was in a position to open this fudge and dry it out, so that it would be in a condition to obtain such a high price for the fudge, and as far as he was concerned he would either buy it at a price, or Mr. Pocius could ship it back; he didn't particularly care, one way or the other. And there were also some shipments in transit—three or four shipments in transit, that Mr. Pocius had shipped to Mr. Bower after receiving his cancellation wires; so they arrived at a price on the ones that were in transit, not because of any condition that the fudge might have been in; simply because Mr. Pocius had shipped it without authority. I believe the price on this they arrived at was 32½c, and the condition of the fudge had nothing to do with it. Then they haggled back and forth for a while as to what they were going to pay for the balance of the fudge. Mr. Bower made an offer, as I remember, of 20c a pound, and finally told Mr. Pocius that [271] 20c a pound was his offer, and as I remember his words, he would not pay 20½c a pound for it; to either accept it or ship the fudge back.

Mr. Pocius seemed to think the matter over for some time in his own mind. Finally he agreed to

(Testimony of R. E. Mitchell.)

accept the offer that Mr. Bower had made. By that time it was getting a little late in the day, and Mr. Bower then made the suggestion that this was going to take some time in order to get through these invoices and write checks for each one, and he suggested that Mr. Pocius return the following morning, and that during the evening he would try and have things straightened out so they could clear it up as rapidly as possible the following morning. Mr. Pocius and I left, and we returned the following morning. Mr. Bower had the invoices there, and made a check out for each one of the invoices, which Mr. Pocius received or accepted; and that about covers it, your Honor.

Q. By Mr. Rolston: In your opinion, when you examined the fudge in Mr. Bower's place of business, was that still saleable fudge?

Mr. Wheeler: If your Honor please, I think that assumes a fact not in evidence. I don't recall there has been any examination of the fudge.

A. Yes, Mr. Pocius inspected the fudge in the warehouse that Mr. Bower had. That was the testimony [272] yesterday. Mr. Pocius, Mr. Bower, his son Carlton, the four of us went in the back room. Mr. Bower had the fudge stacked all over the place, and we pulled cases out here and yonder in order for Mr. Pocius to have a good idea as to the condition of the fudge.

There was no tendency whatsoever towards mold. I mean, there was no indication of mold at that time. There was no indication of it being hard

(Testimony of R. E. Mitchell.)

or dry or baked up, but there were numerous cases where the stuff was very wet, very moist. The oil had raised on the top maybe one-eighth of an inch thick, and it was seeping through the cases. Maybe a case was all right, but the darn stuff had leaked through on top, and it was a messy job. It might be that Mr. Bower did not have the time or the help to dry the fudge out. If the fudge had been dried out properly it could have then been sold as a 90-cent fudge; but you couldn't sell a sloppy piece of merchandise for that kind of price.

Mr. Rolston: That is all. Cross examine.

Recross Examination

By Mr. Wheeler:

Q. How many of the cases would you say were examined at that time?

A. Just guessing, Mr. Wheeler, I would say that we probably opened that day maybe 30 or 40 cases. We opened an awful lot of them. [273]

Q. By the Court: You took them from various parts of the warehouse?

A. Yes. In other words, your Honor, Mr. Bower had them stacked at various places all over the warehouse.

Q. He told you he had complaints about the wetness of the merchandise.

A. We all knew that. That had come up before.

Q. By Mr. Wheeler: Do you know how much merchandise Mr. Bower had in the warehouse at that time?

A. I did not count it, no, sir.

Mr. Wheeler: I have no further questions.

HOWARD P. CLARK,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Howard P. Clark.

Direct Examination

By Mr. Rolston:

Q. Mr. Clark, what is your business or occupation?

A. I am a buyer of job lots, close-out, distressed merchandise or surplus stock the merchants weren't able to get rid of until the war. There is none of that now.

The Court: There is no distressed merchandise?

A. No; the last three years, I have turned from that into the wholesale candy and tobacco business, chewing gum, and so forth; the confectionery business. I have confined my efforts to that. However, I do occasionally get a call from a jobber, broker, manufacturer's representative, warehouses, for something that is not selling right now. The other day a man had 300 cases——

The Court: That is enough. We all wish you well.

Q. By Mr. Rolston: For the last three years, however, you have been concentrating on candy and candy items.

A. That's right.

Q. Did you have any occasion to buy any fudge from the Bower-Giebel Wholesale Company in the early part of 1944?

(Testimony of Howard P. Clark.)

A. 1944—the early part of 1944 I bought from Mr. Bower—say in January, 1944, I bought a lot of fudge from Mr. Bower; approximately 14,000 pounds at one lot.

Q. Did you sell that merchandise?

A. I sold it, every bit.

Q. Was any of it molded?

A. I had no complaints of it. I sold it to reputable markets, such as Von's, Roberts Public Markets, Newberry's 5 and 10 cents. The individual manager of their store bought that fudge, at the instigation of the head buyer.

Q. You sold considerable fudge?

A. To the Newberry stores, in the southwest part of [275] town, Downey, Bellflower, and out in that territory.

Q. Did you buy any of this Pan O' Butter Fudge prior to January 1, 1944?

A. January 24th, when I bought all the lot.

Q. That was bought at a reduced price?

A. Bought at 22c a pound.

Q. Prior to that had you bought some fudge for 55c a pound?

A. I had used a considerable lot, 500 to a 1000 pounds, which I would buy at different times, and sold it.

Q. Several times?

A. I would say several times.

Q. You have sold that at a mark-up?

A. I sold that at my regular mark-up the OPA allows a wholesaler to make.

(Testimony of Howard P. Clark.)

Q. Did you receive any complaints from any of the customers you sold to?

A. I did not. I sold several times.

Q. You sold them other products? They are customers of yours?

A. Yes. I never lose a customer.

Q. Did you have any conversation with Mr. Ashby, of Sears, Roebuck, pertaining to any part of this Pan O' Butter Fudge?

A. Some time after I made the purchase on January 24, [276] 1944 from Mr. Bower. The reason I remember it was after that time was because I was conscious of the fact that he had a quantity of fudge. One evening, after my day's work, on my desk my wife had made a notation on my pad to call Mr. Ashby or Sears, Roebuck, which I did the following morning. I asked Mr. Ashby what he had in mind, and he said he had some fudge. I said, "Well, what's wrong?" To the best of my recollection, Mr. Ashby said, "I over-bought." I said, "Well, I will try and get out and see it. I am pretty busy evenings. Different fellows, and different markets call me up and want to know why I don't bring them merchandise."

Q. During the conversation did Mr. Ashby mention anything about price?

A. He did not, and I never mentioned the price.

Q. Did he say how much fudge he had?

A. He said possibly 10,000 pounds.

(Testimony of Howard P. Clark.)

Q. Did you have another conversation with him shortly after that?

A. To the best of my recollection I did not go out to see Mr. Ashby. I was pretty busy. In a few days Mr. Ashby called me at home, and I told him I was not interested in fudge, on the second call.

Q. Was any price mentioned at that time?

A. He kept on jabbering, and I said I wouldn't give a [277] dime a pound. I said, "I am not interested in it at all at any price."

Mr. Rolston: You may cross-examine.

Cross Examination

By Mr. Wheeler:

Q. Did you examine any of this fudge?

A. Where?

Q. That you bought?

A. From who?

Q. You talked about Pan O' Butter Fudge. Who did you buy it from? Were you talking about what you bought from Mr. Bower?

A. What I bought from Mr. Bower I examined.

Q. What was its condition with reference to moisture on top?

A. If you want to take my definition as to moisture, with the other versions as to moisture which the witnesses have given. My conception of this fudge, when I looked at it, it was not moist. It was syrupy. The syrup came up around the

(Testimony of Howard P. Clark.)

pecans. That was the content. In other words, sticky syrup was oozing out of the fudge.

The Court: Did you notice that condition in the stuff you bought?

A. Oh, yes.

Mr. Wheeler: I have no further questions. [278]

Mr. Rolston: Just one question: Was there any of the fudge you bought which was moldy?

A. I never had any complaints on it. I never saw any mold on it. I sold to different markets at different intervals, after I bought the last bunch from Mr. Bower—Von's Market, and Bellflower bought three or four times from me.

EARL E. BOWER,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Earl E. Bower.

Direct Examination

By Mr. Rolston:

Q. Mr. Bower, you are a partner in the Bower-Giebel Wholesale Company? A. Yes, sir.

Q. What is the business of the Bower-Giebel Wholesale Company?

A. Wholesale candy and tobacco.

Q. For how long have you been employed in that business? A. Probably 40 years.

(Testimony of Earl E. Bower.)

Q. Have you had much experience with bulk chocolates or [279] fudges?

A. None at all, up until the time of this fudge.

Q. Mr. Bower, you had a phone conversation with Mr. Ashby—

The Court: Do you have difficulty in hearing?

A. A bit.

The Court: Stand closer.

Q. By Mr. Rolston: During the latter part of October did you have any conversation with Mr. Ashby of Sears, Roebuck and Company?

A. Yes, sir.

Q. Regarding fudge? A. Yes, sir.

Q. When was your first conversation with him regarding fudge?

A. October 20th, about 1:30 or 2 in the afternoon.

Q. Was that on the telephone, or in person?

A. I called Mr. Ashby on the telephone.

Q. What was said by you and Mr. Ashby, to the best of your recollection, in that telephone conversation?

A. I said, "Mr. Ashby, I have two gentlemen here with a sample of fudge. It's a very good eating fudge, and appeals to me. Now, we don't know anything about fudge at all, but they tell me that as high as a carload would be available, and I wondered if you would be interested in it." [280] He said, "Yes, I would. I will be down in 15 minutes."

(Testimony of Earl E. Bower.)

Q. And thereafter did you have a further conversation with him that same day?

A. Yes, sir.

Q. Where was this conversation, in your place of business?

A. Yes, sir.

Q. Were Mr. Mitchell and Mr. Erhart present?

A. Yes, sir.

Q. Will you relate that conversation to the best of your ability and what the respective parties said, or the substance of the conversation?

A. After introducing Erhart and Mitchell to Mr. Ashby I said, "Well, Mr. Ashby, here is the fudge. Taste it. It looks good to me." I said, "But these fellows want 50c a pound. I never heard of fudge at 50c a pound." I said, "If you buy any of that fudge I would have to charge you 55c for it net. Now, the factory wants 50c a pound, less one per cent, and these men tell me that's f.o.b. Chicago. However, they have led me to understand they could get full freight allowed in a little quantity. The question arose about the OPA, and I said, "Mr. Ashby, these men tell me that Marshall Field has got it in Chicago, selling it at a dollar a pound; The Denver Drygoods Company at another price perhaps. They told me that the OPA's approval could be had." [281] Mr. Ashby talked about a carload. Mr. Erhart and Mr. Mitchell said a carload would not be possible; that they could get a carload perhaps in quantity, but not in one shipment. That the factory is small, and they haven't got the floor space, and they

(Testimony of Earl E. Bower.)

couldn't accumulate a car, but they could ship from day to day, the equivalent of a car.

Mr. Ashby asked if it might not be possible to make these deliveries to his warehouse on South Soto Street, and it was finally thought that as the shipments came into the dock or depot of these transportation companies, that we could control them a little, and divert the shipments as they came in, and thereby get a free delivery; instead of delivering it to our stock, deliver it right to Sears, Roebuck and Company.

Mr. Ashby examined the fudge thoroughly, and expressed a wish of having more nuts, ground nuts, in the body of the fudge. He expressed a wish that he would like to have a little paper doily on top of the fudge, and if I recall correctly he would like to have the fudge a little lighter in color, and whatever there was, Mitchell and Erhart thought these things could be accomplished. Mr. Mitchell said, "I will go to Chicago and follow this fudge through, to get the daily production, get shipments as prompt as possible" and to see that the fudge is carried out as we have just discussed here today. During the conversation Mr. Clark came in, tasted the fudge, and asked some questions; then called me [282] behind the partition behind my chair and said, "Mr. Bower, I would like to order a half carload of that fudge." I said, "Do you mean it?" He said, "Yes." I said, "All right, I will take the order." So I came around

(Testimony of Earl E. Bower.)

the back of the partition and I said, "Mr. Clark just ordered a half a carload of this fudge."

Q. Was that when Mr. Ashby was present?

A. Mr. Ashby was present. So Mr. Ashby spoke up and said, "Mr. Bower, if I give you an order for the fudge, I don't want anybody else to have the fudge until I have had mine." I said, "Mr. Ashby, I think that is very fair. You are the first I called up on the telephone, so if you make a purchase, I consider you have made the first one, and until your order is completed, whatever it may be, there will be no other fudge, so far as I am concerned to deliver to anyone else." After all the discussion and many angles, Mr. Ashby retired to a table near my desk, and wrote out an order for 1000 cases, 28,000 pounds, at 55c net.

Q. I show you Defendant's Exhibit A, and ask you if that is the purchase order that you referred to, that Mr. Ashby wrote it at that time.

A. Yes, I know it by heart.

Q. You put the ink figures on there yourself?

A. Yes; those are the shipments that came through.

Q. And those are your invoice numbers you put on there [283] opposite the shipments?

A. Yes; 10 of them, I think.

Q. How long did that conversation last?

A. It was quite lengthy; at least an hour.

Q. As a matter of fact, part of it was after your closing time, was it not? A. Yes, sir.

(Testimony of Earl E. Bower.)

Q. After that time did you receive any further sample from Chicago?

A. Yes, sir. Mitchell had agreed to send a sample with more nuts in it. From the original conversation I neglected that. And I did, on November 1st, receive a sample by airmail, special delivery.

Q. Did you thereafter have a conversation with Mr. Ashby concerning that sample?

A. He happened to come in a short time after I got the sample.

Q. The same day?

A. He came in the same day.

Q. You had a conversation with him regarding the fudge?

A. Yes. I said, "Ashby, look what I got." Do you want me to repeat that conversation?

Q. Yes.

A. I said, "Here is a sample with the more nuts in it." So we opened it up. I asked him to taste it; he hesitated, [284] and finally I did get him to taste it. He said, "Say, it eats good. We call sell a lot of that fudge." I says, "Look at those stamps. Look what it cost to send it to you, nearly \$15 worth." He says, "Mr. Bower, can I have those stamps?" I says, "Sure. I haven't any use for them", so I got a knife and cut the stamps off the container.

Q. Did he take any of that fudge with him?

A. Yes, as I remember, he just took a small piece, not much of a sample; he took a sample with

(Testimony of Earl E. Bower.)

him. He could have had more, but he did not want it.

Q. How large size was the sample that came through the mail?

A. As I remember it, not too large; probably a piece that square.

Mr. Wheeler: Indicating about four inches?

A. Four inches, yes.

Q. By Mr. Rolston: When was your next conversation or talk with Mr. Ashby concerning the fudge, after that occasion?

A. About November 15th, 16th or 17th.

Q. Where did that conversation take place?

A. In my office.

Q. Mr. Ashby presented himself?

A. Yes.

Q. Was anyone else present, that you recall, during the [285] conversation?

A. Oh, I couldn't specifically say who was there at that time. I didn't pay any attention.

Q. What was the subject matter of that conversation?

A. I had received from the Karmelkorn Kommissary a letter claiming that their product met the approval of the OPA, and I gave it to Mr. Ashby; I gave him the original and took a copy.

Q. I show you Defendant's Exhibit B. Is that the letter you are referring to?

A. Yes, that's it. I said, "Mr. Ashby, you have no idea of the detail that's been necessary to complete this transaction up to now." He said, "Bower,

(Testimony of Earl E. Bower.)

when am I going to get some fudge?" I says, "Haven't you gotten some?" He says, "No." I said, "I have had bills for it for a long time; your first shipment came out November 4th. I haven't billed you for the fudge, because I thought I would wait until it arrived. I want to know when it arrives, because I have to pay the freight on it. I have some bills here; but tonight I will bill you for it." But I showed them to him, when they were shipped on the 4th and another on the 8th, whatever they were; so he was satisfied he was going to get some fudge soon.

Q. When was your next conversation with Mr. Ashby concerning fudge? [286]

A. November 29th.

Q. You stated that was at your place of business?

A. Yes, sir.

Q. Who was present besides you and Mr. Ashby?

A. He came to my desk—Mr. Rolston, I would have to explain who was present in the conversation?

Q. Yes.

A. At the time he came to my desk he and I were there alone. That answers that question, doesn't it?

Q. Yes, and what was said?

A. "Here, Mr. Bower, I have got something for you."

Q. Did he give you something?

A. He sure did.

(Testimony of Earl E. Bower.)

Q. What was it?

A. I sat down at the desk, and I says, "What is it?" I looked it over and I says, "What is it?" He says, "That's your fudge." I said, "You don't tell me?" So I ripped the bag open, and got it out and I says, "That's funny." I said, "Stella"—calling Mrs. Giebel; I says, "Cart"—calling my son; I said, "Ham", another son—"Come here. Mr. Ashby says this is the fudge he is receiving; the Pan O' Butter Fudge." I said, "Mr. Ashby, in my position, I can't explain it if that's the way it's coming through." Well, he said, "Mr. Bower, that fudge is unsaleable. I can't use it, and I cancelled the order and I stopped payment on your [287] invoices for the fudge."

Mr. Ashby said, "Mr. Bower, have you paid for this fudge?" I says, "You know damn well I have. You was there I think when I gave him a \$7,000 check." I says, "What had you in mind, Mr. Ashby, stopping the payment of a check?" I said, "I will get my checkbook and look up the stubs. No doubt there have been remittances, several, since. Maybe we can stop some." So I got the checkbook and looked up the stubs where just a day or two ago, the 26th, I think, we had sent them a check for a couple of thousand dollars and another one on the 26th, and I said, "Yes, we can stop those checks. Shall I stop them, Mr. Ashby?" He said, "Sure."

So I called Josie, my secretary, and I says, "Josie, we will write to the bank and stop pay-

(Testimony of Earl E. Bower.)

ment on some checks. I will get you the checks when we get the letter." I says, "Mr. Ashby, that complicates us, don't it?" He says, "Sure." So we looked at each other and smiled. Mr. Ashby says, "Got anything I can buy, Bower?" I says, "Look around the stockroom with Ham; he will show you."

Q. You had other discussions, and he ordered business after that?

A. I think he went with Ham, my son. We call him Ham. His name is Hamilton. May I have a glass of water? My mouth seems to be getting dry like the fudge, maybe.

Q. Thereafter did you write the Karmelkorn Kommissary [288] concerning that letter?

A. I said, "Mr. Ashby, I will call the factory representative, and have him come out there, and I will report this condition to the factory, and I will stop the payments on those checks."

Q. I show you a copy of a letter dated November 29th addressed to the Karmelkorn Kommissary, 3600 South Halsted Street, Chicago 9.

A. Shall I read it?

Q. Is that the letter you sent? A. Yes.

The Court: You don't have to read it.

Mr. Rolston: I will now offer it into evidence.

The Clerk: Plaintiff's Exhibit No. 6.

Q. By Mr. Rolston: Thereafter you also stopped payment on some four checks totalling over \$7,000?

A. Yes, sir.

(Testimony of Earl E. Bower.)

Q. And you called Mr. Erhart to go over there, as the factory representative—that may go out.

Mr. Wheeler: I move that the words “as the factory representative” be stricken as a conclusion.

The Court: His position has already been established by other evidence. It doesn't matter.

Q. By Mr. Rolston: When did you next have a conversation with Mr. Ashby? [289]

A. About 11 o'clock, December 2nd, in the morning.

Q. Was that by telephone, or in person?

A. Mr. Ashby called me on the telephone.

Q. Will you relate the conversation that you had with Mr. Ashby at that time?

A. He said, “Mr. Bower, this is Ashby.” —“Oh, yes.” —“I have some good news for you.” —“What's that?” He says, “I can use the fudge. —“Well, what's happened?” He said, “Mr. Erhart was out here a few days ago and he showed us how to open up the fudge and leave it dry a few hours and it works. We can cut the fudge.” I said, “Well, Mr. Ashby, I sure am grateful for all the work and detail you have gone through to try and make this transaction.” And Mr. Ashby lipped up and said, “Mr. Bower, what are you trying to do, sell yourself to me?” —“No, Mr. Ashby, but I am really grateful. It is too good to be true.” He says, “Don't worry about it. I can use the fudge.” I says, “Ashby, what will we do about the two checks we cancelled?” He says, “Withdraw them.” I said, “All right.”

(Testimony of Earl E. Bower.)

Q. During the conversation did you ask him when your invoices would be paid?

A. No, I don't think I did.

Q. Thereafter did you write a letter to Karmelkorn Kommissary concerning the matter? [290]

A. Yes, I did.

Q. I show you a copy of a letter dated December 2, 1943, addressed to Karmelkorn Kommissary, and ask you whether or not that is the letter you wrote to them? A. Yes.

Mr. Rolston: I offer this letter as our next exhibit.

The Clerk: Plaintiff's 7.

A. Mr. Ashby also in the conversation asked if we had any cigarettes down there. I said, "Not many, Mr. Ashby, but I can probably get you up a few." He says, "I will see you tomorrow."

Q. By Mr. Rolston: Did you see Mr. Ashby the next day?

A. I got down to the store a little bit late the next morning, but when I was there to open up there was our organization and Mr. Ashby were at the door, and they all came in together. I said, "Mr. Ashby, that reminds me. I withdrew the stop-payment on those checks, yesterday, at the bank, but they said I had to confirm it with a letter." I says, "You know, I forgot all about to write that letter." I says, "Josie, make a note of it; write a letter to the bank confirming the withdrawal of my checks yesterday." I said, "Mr. Ashby, now that I have withdrawn the stop-payment on my checks,

(Testimony of Earl E. Bower.)

are you going to withdraw the stop-payment on my invoices?" He says, "You will get some money in a few days." [291] So Mr. Ashby went to a table, which was only about two feet away, and he says, "What cigarettes did you get for me, Bower?" We went over 10 or 12 items. As I recall it, he had a blank piece of paper, and jotted it down. He said, "I am in a hurry this morning. I will take this to the office, and have the girl write them out, and I will put them in the mail for you, and they will follow along."

Q. That was all the conversation you had at that time? A. Yes, sir.

Q. I show you copies of two letters, one dated November 29th, the second one dated December 3, both 1943, to which are attached four checks and ask you if those were the checks you were discussing as having stopped and then withdrew the stop-payment on them?

A. Yes, sir. I want to explain about this letter of December 3rd, to the bank. Josie wrote it that day, because that was the day, but I had withdrawn these checks the day before. So when I took the letter over to the bank on the 3rd, the original letter, I changed the date with the bank's pen and ink and marked it the 2nd, to harmonize with my withdrawal on those checks.

Mr. Rolston: I offer these documents as one exhibit next in order.

The Clerk: Attached and marked 8.

Q. By Mr. Rolston: During the month of De-

(Testimony of Earl E. Bower.)

ember, and [292] prior to Christmas, did you have any further conversation with Mr. Ashby?

A. Yes, some time after that.

Q. Did you see him very often during that time?

A. No. No, I don't recall his being in except once or twice in December, after the 3rd.

Q. On those occasions did you discuss the fudge at all? A. Yes, sir.

Q. When was the next time that you discussed fudge?

A. I don't have available the date; it seems to me about a week before Christmas Mr. Ashby called, and he says, "Mr. Bower, do you know I have darn near lost my job?" — "Why, how is that?" He says, "The big boys of Sears, Roebuck and Company are here. They called me in, and I spent a whole day there." I says, "What about?" He says, "They tell me I have bought too much of this high-priced fudge." I says, "What did you do about it?" He said, "I had to talk like a Dutch uncle. I told them I could sell the fudge." — "Have you still got your job?" — "Oh, yes."

Q. Did he, during that conversation, mention anything about any mold on the fudge?

A. Oh, no.

Q. Did he mention that the fudge was getting dry? A. Oh, no. [293]

Q. When was your next conversation with Mr. Ashby concerning the fudge?

A. As I recall it, he telephoned me.

Q. When was that?

(Testimony of Earl E. Bower.)

A. Some time in December. I haven't the date.

Q. What was said at that time concerning the fudge?

A. He said, "Mr. Bower, in the original order of 28,000 pounds, through delivering whole shipments at a time to our warehouse, there has been some over-shipped over the 28,000 pounds." I says, "Well, we will be glad to pick it up, Mr. Ashby. Where is it?" He says, "It's in the Soto Street warehouse." I says, "How much is it, Mr. Ashby?" He says, "Mr. Bower, I bought, as near as I can tell, 28,000 pounds. There isn't over 10 or 15 pounds difference between the 28,000 and that I would accept." I says, "We will be glad to pick it up."

Q. Thereafter did you pick up that fudge?

A. Oh, yes. I explained to Mr. Ashby, I said, "This is the Christmas season, Mr. Ashby. We are short-handed. I doubt whether I can pick it up before Christmas. Is it in your way?" He says, "Oh, no, but I do want you to pick it up." I says, "We will sure pick it up."

Q. After the first of the year I believe you picked it up?

A. Yes, sir. I will come to that. [294]

Q. I show you two documents purporting to be on the stationery of Sears, Roebuck and Company, one being an invoice form, the other being a retail return, and I will ask you if you got these documents on the day you picked up the merchandise?

A. Yes, sir.

(Testimony of Earl E. Bower.)

Q. That was on—— A. January 11th.

Q. Refreshing your memory from this retail return, do you remember the number of pounds you picked up?

A. About 1928 or '68. Which is it? It is on there.

Q. 1928.

Mr. Rolston: I ask that these two documents be marked together.

The Clerk: Attached and marked Plaintiff's Exhibit 9.

Mr. Wheeler: No objection.

Q. By Mr. Rolston: Did you examine the fudge after you got it back to your warehouse?

A. Yes, sir.

Q. About how many cases did you examine of that 1928 pounds? A. Oh, probably 8 or 10.

Q. Did you find any of it moldy?

A. No, sir. [295]

Q. Did you find any of it was hard, unduly hard? A. No, sir.

Q. Did you sell that fudge? A. Yes, sir.

Q. Did you have complaints from the customers to whom you sold it? A. No, sir.

Q. You sold it after you received it, naturally, after January 11th? A. Yes, sir.

Q. Did you have any further conversation with Mr. Ashby after the last one you have related?

A. Before Christmas?

Q. Yes, since then. A. Yes, sir.

Q. When was the next conversation?

(Testimony of Earl E. Bower.)

A. December 27th.

Q. 1943? A. 1943.

Q. Where was that conversation?

A. In my office.

Q. Who was present at that time?

A. I don't recall specifically.

Q. You and Mr. Ashby? A. Yes, sir.

Q. What was said at that time, to the best of your recollection?

A. Mr. Ashby came in to inquire if we had some cigars, as I recall it. I said, "Mr. Ashby, how did you get along with the fudge for Christmas?" —"Lousily. We have only sold about 10,000 pounds." I said, "What's the matter?" He says, "Mr. Bower, I just can't do anything with these girls; green help; green girls; they don't know anything about fudge, and they just won't spoil their hands to cut that fudge. I just can't do anything with them." He says, "Do you know, with this green new help in my Slauson Street store,—I have some beautiful chocolates; you know how scarce they are." He says, "I had to go down there and pull off my coat and show these girls how to sell chocolates. They are in demand." He says, "I sold them so fast, they just took them and lapped them up." I says, "Mr. Ashby, why don't you pull your coat off and try it on the fudge?" He says, "I will sell them after Christmas."

Q. When was the next time you had a conversation with Mr. Ashby after that?

(Testimony of Earl E. Bower.)

A. As I recall it, he was in the next day, and my son waited on him,—Hamilton.

Q. Did you discuss fudge at that time?

A. I wouldn't say there was any discussion of the fudge. [297]

Q. By yourself? A. No, sir.

Q. When was the next time you discussed fudge with Mr. Ashby? A. January 12, 1944.

Q. Where was that discussion, on the telephone or in person? A. No, he called at my office.

Q. Who was present at that time,—anybody besides yourself and Mr. Ashby?

A. There could have been, but I don't recall it.

Q. What occurred?

A. He brought in another specimen of fudge and laid it on my desk, and he says, "Look here, Mr. Bower," he says, and I says, "What; more fudge, Ashby?" He says, "Yes." I says, "My God, that looks as though it's been baked. What happened to it?" —"That's the way I got it." I says, "Where did you get it?" —"One of our stores." I says, "How much of this fudge is in those stores like that?" He says, "All of it." I said, "What temperature do these stores have that's got this fudge?" He says, "About 72 degrees." I said, "Mr. Ashby, it looks to me you are just booked for a lot of trouble. I can't explain it. I don't understand it; but that specimen looks to me as though it's been carried in some heat, because, when it is subjected to [298] heat it becomes gray. The butter fat comes to the surface. That's hard

(Testimony of Earl E. Bower.)

as wood.” I said, “Well, I will see if I can get Mr. Erhart and Mr. Mitchell, and have them come over and see now what’s the matter.” I said, “Mr. Ashby, you are familiar with this whole transaction to date, and it looks here that there is nothing I can do for you on that fudge. I can’t be responsible for any neglect, and you know it’s your fudge.” I called, in his presence, and was able to get Mr. Mitchell, and I explained what was happening here with this hard fudge, and asked him to go over to Mr. Ashby’s office and see if he could ascertain what was wrong. He says, “Earl, Mr. Erhart is in San Francisco. He is expected home tonight or tomorrow. I would rather not go over there alone. I would like to have Mr. Erhart with me.” So I related it to Mr. Ashby, and it was understood the two would come over. It was understood the two will come over to Mr. Ashby as soon as Mr. Erhart got back.

Q. That was the end of that conversation on that day? A. Yes, sir.

Q. When was your next conversation with Mr. Erhart concerning that fudge?

A. He called me the next day and wanted to know if Erhart got home yet, and I says, “No, I haven’t heard from him, but”, I says, “I am right onto him, and as quick as that man gets here I will get hold of him and see that these boys go [299] over there.”

Q. When was the next conversation?

A. The next day, January 12th.

(Testimony of Earl E. Bower.)

Q. Was that in person or on the telephone?

A. Wait a minute. I did not have a conversation with Ashby on the 12th. These boys went over there. My conversation was with Erhart and Mitchell, I think, on the 12th.

Q. When was the next conversation with Ashby regarding the fudge?

A. I believe it to be about January 17th.

Q. Was that by telephone, or in person?

A. He called me up in the afternoon.

Q. On the telephone?

A. On the telephone.

Q. What did he say, and what did you say at that time?

A. He said, "Mr. Bower, you didn't come up here. Mitchell and Erhart made an appointment for you to come up here", I think it was on Monday, or whenever it was. I said, "I know it, Mr. Ashby. We have just sold a big order for overseas to the Navy. It's an emergency order, 132 cases." I said, "The Navy themselves have come in here with eight carpenters and are preparing those 132 cases for overseas. Other than that I just couldn't get away today. Maybe tomorrow." He says, "I want you to come up and see it." [300]

Q. Was anything else said at that time?

A. No, sir.

Q. When was the next conversation with Mr. Ashby?

A. May I got back to the 10th for just one more thing?

(Testimony of Earl E. Bower.)

Q. Do you mean you forgot something in the conversation? A. Yes, I forgot something.

Q. What else was said?

A. Mr. Ashby said, "Mr. Bower, you haven't picked up that excess fudge over there. We would like to get it out of there." I said, "I have neglected it", and I said, "Mr. Ashby, I will be there the next day in person, and pick up that fudge," which I did.

Q. Now, we come down to the 17th again, Mr. Bower. When was the next conversation after that with Mr. Ashby?

A. He called me again on the telephone and said, "Mr. Bower, aren't you coming up?" I said, "I couldn't get away for some reason," and before, however, the next day, which might have been Tuesday, I had telephoned to the office of Mr. Ashby, and the girl answered, and she tried to locate Mr. Ashby, and said she couldn't. I said, "Will you take this message: I wasn't able to get up there today; the same reason as yesterday." She says, "Yes, I will give him the message", but, however, he called me to remind me that I was to come up, but I couldn't. [301]

Q. Did you go up there the next day?

A. No, sir.

Q. Did you have any further conversation with him prior to receiving that letter from him?

A. He called me up again on the next day about going up there.

Q. You did not go up there?

(Testimony of Earl E. Bower.)

A. No, I said I couldn't go up there, and anyhow, I didn't see how I could do him any good under the circumstances.

Q. During that period of time did you receive any checks in payment from Sears, Roebuck?

A. Oh, yes.

Q. When was the first, if you remember—the first check you received in payment of any fudge invoices?

A. Two or three days after he said he would send me money, and that was on December 3rd. Two or three days after that he sent me \$9,100.

Q. When was the next time you received any payment from Sears, Roebuck on account of fudge invoices?

A. I think it was January 15th,—some \$10,000.

Q. Thereafter I believe you received a letter from Mr. Ashby?

A. On the 22nd I received one, registered.

Q. I show you Defendant's Exhibit H. Is that the letter you are referring to? [302]

A. Yes, sir.

Q. Is that the letter you received?

A. Yes, sir.

Q. Thereafter did you have any conversations with anyone connected with the Sears, Roebuck organization? A. Yes.

Q. When was your next conversation with anyone connected with the Sears, Roebuck Los Angeles store? A. I think it was February 1st.

Q. With whom was that conversation?

(Testimony of Earl E. Bower.)

A. A man by the name of Theaker called me on the telephone.

Q. Did he identify himself as being connected with Sears, Roebuck?

A. Yes, he said he was superintendent or supervisor.

Q. You talked on the telephone at that time?

A. Yes.

Q. What was said at that time?

A. He said he was superintendent or supervisor, and that he had hoped that he could act as a go-between in this matter with Mr. Ashby and me, in the hope that he could accomplish something, and wondered if I would like to come up to his office the following morning, which we assured him we would be glad to do.

Q. Did you on the following morning see Mr. Theaker? [303]

A. We had an appointment at 9:30, but I did not know which door to go to, so I went to the regular door, and they wouldn't let me in. I just couldn't get through those people, those guards.

Q. That was the regular door for customers to go in?

A. Yes. I should have gone to a particular door, where he had arranged I could have gone through, but I did not know.

Q. Was anyone with you at that time?

A. My son Carlton.

Q. Eventually that morning did you see Mr. Theaker?

A. Yes, after 10 o'clock.

(Testimony of Earl E. Bower.)

Q. That was when the store opened?

A. Yes.

Q. Was there anyone else present besides the three of you,—your son, Mr. Theaker and yourself?

A. No.

Q. What was said at that time between you, your son, and Mr. Theaker?

A. Mr. Theaker said, "Mr. Bower", after we introduced ourselves, "Mr. Ashby speaks very highly of you people, and would like to continue business with you, and we think you have high regard for Mr. Ashby." He said, "I have been suffering with a cold, and I haven't been here for several days," and he was eating some licorice that was mentholated; I [304] think they call it Nix or Hix or something, and he said, "I would like to discuss this matter with you, and maybe I can be helpful to get this matter straightened out." I said, "That will be very fine. I have brought my file up here, with all my records, and I would just like to go through this with you." He said all right, and I said, "Let's start with Mr. Ashby's letter to me of January 20th." He said, "All right, I have got a copy of it right here." And he pulled it out of his little brief case.

Q. Do you want the letter while you are talking, Mr. Bower?

A. I don't think so. I said, "Mr. Theaker, in the first place Ashby has written me this letter, and I replied to it and said it doesn't contain the facts." He says, "I have a copy of that letter,

(Testimony of Earl E. Bower.)

too." I says, "Let us review it." I says, "Look in the first paragraph. Mr. Ashby openly acknowledges he has only contacted me twice with all this matter of unsalable fudge—only twice. The first one was November 29th." I said, "Mr. Theaker, now listen. He came to my office with a bagful of soft fudge, like putty, and he told me it was unsalable; that he couldn't use it. He cancelled the order, and he said, 'I'm going to stop payment on your fudge invoices.'" He said, "Have you paid for this fudge?" And I said, "Yes, I have." I said, "What have you got in mind—Mr. Ashby stopping payment on [305] these fudge bills?" He said, "Yes," and I said, "Wait a minute, until I get my checkbook."

The Court: You are repeating the conversation you have already told us about, and that is sufficient for that purpose.

A. Yes; I could have done that, but I did not think of it.

The Court: All right.

Q. By Mr. Rolston: You related the various conversations and transactions you have related here in court? A. Yes, sir.

Q. At that time you also showed him what you had paid for the fudge, and showed him the checks, and what, if anything, did he ask or tell you during the conversation?

A. Well, it finally developed that Mr. Theaker said, "Mr. Bower, the first half of this order was good, and we sold all. It's the second half." He

(Testimony of Earl E. Bower.)

said, "Some of the second half was good, and some was bad." I said, "There are no halves to it. There was only one order being shipped."

Q. Go on.

A. He said, "Do you suppose there were any delays in the transportation from the factory to Los Angeles?" I said, "I thought we got excellent service. As I recall, it's coming through in 10 or 12 days and refrigerated service, too." [306] He says, "I have a record of this shipment." I says, "So have I." I got all the bills. I had them all down, shipment by shipment; one on the 4th reached here the 15th, one on the 8th reached here, and so and so." He says, "I must admit you got good service." I said, "Mr. Theaker, I haven't seen this fudge. I would like to see it." He says, "You can see it." "Where is it?" "In the Soto Street warehouse." He took me down there.

Q. Was your son with you at that time also?

A. Yes, sir.

Q. The three of you? A. Yes, sir.

Q. He showed you the fudge?

A. Another gentleman went with us from the office to the warehouse.

Q. Was that Mr. Arnold?

A. I think it was him.

Q. And the four of you examined the fudge?

A. Yes, sir.

Q. What was said between yourself, Mr. Theaker, your son and Mr. Arnold at that time?

A. I did not get that.

(Testimony of Earl E. Bower.)

Q. What was said at that time between yourself, your son, Mr. Theaker and Mr. Arnold, if anything?

A. He had to get the key, or combination, or something, [307] to the warehouse. When I got a glimpse of the room, and saw these 28-pound boxes, I recalled that Mr. Theaker said the first half was good, and they sold it all. I said, "Mr. Theaker, there's some of the first three shipments that you said was good, and you sold them all."

Q. Diverting a moment, do you mean the first three shipments of 28-pound cases?

A. The first three shipments of 28-pound cases.

Q. Subsequent shipments?

A. I think they also had some 18-pound.

Q. What else was said in the warehouse stock-room?

A. We opened up some of the fudge, as I recall it, and there was some cases that had been opened, but I wanted to open some fresh ones, and they appeared to be dry and hard.

Q. Did you see any soft fudge at that time?

A. I don't recall seeing any soft fudge.

Q. What else was said, if anything?

A. Well, Mr. Theaker says, "We should take that up with the factory. They should give us an adjustment."

Q. What did you say, if anything?

A. We then left, and went to this Mr. Arnold's office in the warehouse, and that's the first time we learned what Mr. Theaker's idea was.

(Testimony of Earl E. Bower.)

Q. What did he say?

A. He said the factory should receive all that fudge [308] back, 9700 pounds; that this should be sent back to the factory and made over, and then—I don't know whether 25 per cent or 50 per cent more should be sent back with this fudge in addition to the amount of fudge, the 10,000 pounds, which was worked over, and there was to be 50 per cent more; he wanted 15,000 pounds.

Q. What did you say, if anything, to that?

A. I had very little to say. My son got into it.

Q. What did he say, to the best of your recollection?

A. He wanted to know if I wouldn't report this to the factory, and I said yes.

Q. I think you misunderstood the question. My question is what did your son say, if anything?

A. My son says, "Why, Theaker, you want the cake and eat it too. You might as well hit your head on the wall. You will get that just as quick. No factory would make all that fudge good and then give you an additional 50 per cent allowance." Carlton says, "That is salvage fudge and if you get a shipment from the factory, it is brand new. That isn't salvage." Theaker says, "The customers don't know it."

Q. What, if anything, was said at that time?

A. Theaker asked me if I would talk to the people back in Chicago, and I said I would. He also asked me to send a copy of my letter or my report of No-

(Testimony of Earl E. Bower.)

vember 29th, when Mr. [309] Ashby brought in the specimen of wet fudge in the bag.

Q. That is the letter introduced in evidence?

A. Yes, sir.

Q. Did you at that time advise anybody connected with the factory?

A. Knowing that Mr. Erhart was in Chicago, I wired Mr. Erhart, their representative.

Q. I show you what purports to be a copy of a telegram dated February 2nd, addressed: Mr. Alphonse Erhart, Chicago, Illinois. A. Yes.

Q. That is a copy of the telegram?

A. Yes; I sent Mr. Theaker a copy.

Q. This is a copy of your letter to Mr. Theaker of February 2, 1944?

A. Let me know what that is. Yes, that's right.

Mr. Rolston: I suggest that these two be marked together as one exhibit.

The Clerk: 10.

Q. I think that finishes the conversation of February 2nd, doesn't it? A. That's right.

(Whereupon an adjournment was taken until 10 o'clock a.m. of the following day, Thursday, January 11, 1945.) [310]

Los Angeles, California, Thursday,

January 11, 1945, 10 a. m.

EARL E. BOWER,

recalled.

Further Direct Examination

By Mr. Rolston:

Q. Mr. Bower, yesterday I believe we had just started the relation of what occurred with Mr. Theaker, on or about February 2, 1944. When was your next contact with anyone concerning Sears-Roebuck and Company, concerning the fudge?

A. With Mr. Theaker?

The Court: With anybody.

A. As I recall it, it was about the 11th of February.

Q. By Mr. Rolston: With Mr. Theaker?

A. About the 11th of February, yes.

Q. Was that over the telephone, or in person?

A. Telephone.

Q. Did you call Mr. Theaker, or did he call you?

A. Mr. Theaker called me.

Q. What was said at that time on the telephone?

A. Mr. Theaker said he had received a letter from Sears-Roebuck and Company, Chicago, that they had contacted somebody by the name of O'Brien, and O'Brien had advised them that we had received a settlement on Sears' fudge, amounting to several thousands of dollars. He said, "Do you want me to read the letter?" I said, "Yes," which he [311] did. I said, "O'Brien? Who is

(Testimony of Earl E. Bower.)

he?" He says, "He is with the Karmelkorn Kommissary." I says, "I never heard of him, and as far as receiving an adjustment of Sears' fudge, that isn't so."

Q. Was that the end of that conversation?

A. That is all I can recall.

Q. Did you have any further conversation with him that day? A. Yes, sir.

Q. Was that in person, or again by telephone?

A. Yes, sir.

Q. Which was it? A. By telephone.

Q. By telephone again? A. Yes, sir.

Q. Did you call him, or did he call you?

A. I called him.

Q. It was later in the day? A. Yes, sir.

Q. What was said at that time?

A. I said, "Mr. Theaker, I have just called Bob Mitchell to find out who this man O'Brien was. As I understand it, he was a sales manager for a salad dressing company in Chicago, going under a fictitious name. His name is Squiers, and not O'Brien." I said, "Why don't you contact [312] the Karmelkorn Company?" I said, "As I understand it, they have concessions in Sears' stores in Chicago, and you should be able to see them in one of their own stores." He says, "I will take it up with them right away by airmail."

Q. Was that the end of that conversation?

A. As I recall it, yes.

Q. Was there any further conversation that day? A. Not that I recall.

(Testimony of Earl E. Bower.)

Q. On or about that day did you write a letter to Mr. Theaker? A. On February 11th?

Q. Yes. I will show you what purports to be a copy of a letter dated February 11th, addressed to Mr. Theaker. Did you write that letter?

A. I wrote that letter, and it's on the 11th.

Q. I find that letter attached to a sheet of paper bearing figures, numbers, and words.

A. I was under the impression that this took place later in February. I don't recall whether the man asked me on the telephone—he asked me to make out all the bills that we had received for the shipments of Sears' fudge—10 in number, I think; and how we paid for them, and whether by our check. So I made them out, with my check number, and how we paid them, and the net amount the factory would get. The 11th date now is confusing to me, because I [313] don't just recall how the thing came up.

Q. You prepared this in your own handwriting?

A. Yes, sir.

Q. You mailed two copies of it to Mr. Theaker together with the original of this letter?

A. Yes.

Mr. Rolston: I offer this letter and the document attached as one exhibit, Plaintiff's next in order.

The Court: It may be received.

The Clerk: 11.

Q. Did you have any further contact with anyone connected with Sears-Roebuck and Company?

(Testimony of Earl E. Bower.)

A. After that?

Q. After that, yes, after you wrote this letter.

A. Yes, I did.

Q. Was that in person, or by telephone?

A. By telephone.

Q. When, about, was that, to the best of your recollection?

A. I thought that was about the 20th or 23rd of February.

Q. Did you call Mr. Theaker, or did Mr. Theaker call you?

A. Mr. Theaker called me by telephone.

Q. What was said at that telephone conversation? [314]

A. He said he had a letter that he received from the Chicago office again with more details; that it was quite a lengthy letter, but much too much to go over, relative to the settlement or adjustment from the Karmelkorn company, and he wanted to know if it would put me out to come over there. I told him I would be glad to come over, and I would bring the file covering these adjustments.

Q. That was the end of that telephone conversation? A. Practically.

Q. Did you thereafter go over to see Mr. Theaker, in person? A. Yes, sir.

Q. Did anyone go with you?

A. My son, Carlton.

Q. Was that later in the same day?

A. As I recall it, we went right up.

Q. You took the records with you?

(Testimony of Earl E. Bower.)

A. Yes, sir.

Q. I show you Plaintiff's Exhibit, which were all introduced as one exhibit, 4, with various sub-letters, which appear to be invoices from the Karmelkorn Company, together with checks paying the amount of the invoice. Were these the documents you brought with you and showed to Mr. Theaker at that time?

A. Yes. [315]

Q. You went over these in detail with him?

A. Yes.

Q. What else was said during the conversation besides the explanation of the documents?

A. I explained to him that it showed 30c a pound adjustment on the fudge, but that wasn't so. I said, "The adjustment on this fudge was less than 30c f.o.b. Chicago, and on these bills originally I was allowed the freight, but being adjusted as f.o.b. Chicago I absorbed the freight which added about 3c a pound to my cost, so I had a cost of about 23c, instead of 20c, as appears."

Q. What else was said at that conversation with Mr. Theaker?

A. He read the letter he had received from them. It was just this O'Brien again.

The Court: O'Brien kind of got your goat.

A. I said, "I can't just understand why these men back there are consulting me." I stated, "You might as well take the janitor. Why don't you put somebody on there that is competent, or go to the Karmelkorn Company."

Q. Give the best of your recollection of the

(Testimony of Earl E. Bower.)

entire summary of that conversation with Mr. Theaker at that time.

A. He says, "I will take it up with them again."

Q. During that conversation did he ask you to take it up with the factory? [316]

A. Mr. Theaker said, "Mr. Bower, if you will call Mr. Pocius direct, and ask him if he would consider an adjustment on their fudge, Sears-Roe-buck and Company would consider that the Bower-Giebel Company did all they could in Sears-Roe-buck's behalf."

A. Did you call the Karmelkorn Kommissary for Sears?

A. By long distance telephone. Not at Sears. At my office.

Q. Did you have any further contact with Mr. Theaker, Mr. Ashby, or anyone connected with Sears, after that? A. Yes, sir.

Q. When was that?

A. I don't know. It seemed quite a long time after that. I don't know about the date; maybe a week or 10 days; maybe two weeks.

Q. Do you recall who it was with?

A. Mr. Theaker called me on the telephone.

Q. Give that conversation.

A. He said he had a long letter that was not very encouraging for me, and he would like to read it to me, which he did. As he read it I felt it didn't apply to me. I said, "Mr. Theaker, there is no need discussing this matter any further. I will

(Testimony of Earl E. Bower.)

just attach the account." And I hung up the phone in his ear.

Q. That was the last contact you had in person with [317] anyone connected with Sears?

A. That I recall.

Q. Going back a bit, I show you two copies of two letters under date of January 22, 1944, and ask you if you wrote those two letters to Sears-Roebuck at or about the time you received a letter from Mr. Ashby dated January 20th?

A. Yes, sir, I wrote these letters.

Mr. Rolston: I ask that these two letters be introduced.

The Clerk: Attached and marked Plaintiff's Exhibit 12.

Q. By Mr. Rolston: Mr. Bower, just prior to this trial I asked you to get all the purchase orders Sears-Roebuck and Company placed with you after this matter started after October 20th, did I not.

A. Their purchase orders?

Q. Yes. A. Yes, sir.

Q. I show you 12 purchase orders, all appearing on the stationery of Sears-Roebuck and Company, the first of which is dated November 29, 1943, the last of which is dated January 12, 1944. Are those the sum total of all the purchase orders you received between those dates?

A. That's all that I was able to find. There could have been one misplaced, or more.

The Court: They don't come and pick anything up? [318]

(Testimony of Earl E. Bower.)

A. Sears-Roebuck and Company, at my warehouse?

Q. Yes. A. Yes, they do.

Q. They would give these purchase orders?

A. Not without the purchase orders.

Q. They wouldn't do any cash-and-carry business? A. No.

Mr. Rolston: I ask that these purchase orders be introduced as one exhibit.

The Clerk: 13.

Q. By Mr. Rolston: Going back a bit, Mr. Bower, you received quite a bit of fudge, did you not, after Sears had received their 28,000 or 29,000 pounds or so? A. Yes, sir.

Q. Mr. Pocius came out on or about December 30th of that year, as I recall? A. Yes, sir.

Q. Did he examine much of the fudge that was on hand on that occasion? A. Yes, sir.

Q. About how many cases, do you recall?

A. Quite a number. We had many different shipments we got in, and we went from shipment to shipment.

Q. In any of your examinations did you discover any mold whatsoever on any fudge? [319]

A. Oh, no.

Q. You sold all of the fudge that you had on hand? A. Yes, sir.

Q. Did you have any complaints from any person claiming any mold? A. No, sir.

Q. Did you have any complaints from any person at all that you sold to? A. No, sir.

(Testimony of Earl E. Bower.)

Q. You sold some of it to such stores as Bullock's? A. Yes, sir.

Q. In their candy department?

A. Yes, and several others.

Q. The Thrifty Drug Store?

A. Yes, and the Broadway Store.

Q. Newberry's?

A. Yes, sir; many of their stores.

Q. And many other customers?

A. Many others.

Q. You had no complaints of any type or description? A. No, sir.

Q. As far as you know you have never seen any mold on any fudge you have received in your warehouse? A. That's right.

Q. On your adjustment with Mr. Pocius, Mr. Bower, was [320] there any discussion of a complete settlement of all fudge or just a settlement of the fudge that was on your floor?

A. That was on the floor, and in transit.

Mr. Rolston: You may cross-examine.

Cross Examination

By Mr. Wheeler:

Q. How much fudge had you sold prior to the time that Mr. Pocius came out there, Mr. Bower?

A. Including Sears-Roebuck?

Q. Including Sears-Roebuck.

A. I really couldn't answer the question. I don't know. Quite a little.

(Testimony of Earl E. Bower.)

Q. How much did you sell after Mr. Pocius was out here?

A. I had a lot on hand. I probably sold a thousand or 1500 cases.

The Court: It was mostly cigarettes?

Mr. Rolston: That was a year ago. They weren't quite as short on cigarettes.

The Court: Go ahead.

Mr. Rolston: If I may make a statement: These were introduced mainly as corroboration of dates of purchases and course of conduct.

The Court: I understand that.

Q. By Mr. Wheeler: When did you cancel the checks that you had sent to Mr. Pocius in the month of December, 1943? [321]

A. I don't remember the date exactly, but about December 14th.

Q. When did you receive your first shipment of fudge after the Sears-Roebuck and Company fudge?

A. Around December 10th.

Q. Going back to your conversation with Mr. Ashby, in which you said to him, "My God, you saw me hand Erhart or Mitchell the \$7,000 check for the initial payment on the goods", do you recall saying that?

A. I may have said that.

Q. As a matter of fact, did you hand Mr. Mitchell the \$7,000 check at the time of the initial purchase, on October 20th?

A. I don't think I did.

Q. As a matter of fact, you didn't hand it to him at all on that date, is that correct?

(Testimony of Earl E. Bower.)

A. Yes, we handed it to him that day.

Q. Showing you a letter of October 21, 1943, addressed to R. M. McClure Company, I will ask you if you wrote that letter?

A. Yes, I wrote the letter.

Q. Will you read the fifth paragraph of that letter? A. Yes, sir.

Q. Will you read it aloud?

A. Yes, sir: "Herewith attached, please find our [322] check for seven thousand dollars as part payment of the above shipment in advance as good faith. The balance of the shipment will be paid instantly on receipt of the original bill of lading marked prepaid, and covering shipment complete of twenty-eight thousand lbs."

Q. So, as a matter of fact, you sent the letter by mail on October 21st, did you not?

A. I do not recall it, nor the date. My understanding is we handed Mr. Mitchell the check.

Mr. Wheeler: All right. I offer in evidence the letter.

Mr. Rolston: No objection.

The Clerk: That will be Defendant's LL.

Q. By Mr. Wheeler: You subsequently placed another order with the Karmelkorn Kommissary covering this fudge, did you not, Mr. Bower?

A. Yes, sir.

Q. And that order is date October 30th?

A. That is correct.

Q. And is this order in your handwriting?

A. Yes, sir.

(Testimony of Earl E. Bower.)

Mr. Wheeler: I offer in evidence this order, purchase order dated October 30, 1943, addressed to Robert E. Mitchell, care Karmelkorn Kommissary.

The Clerk: MM. [323]

Q. By Mr. Wheeler: Now, Mr. Bower, with reference to your telephone conversation of December 2nd, with Mr. Ashby, do you recall that Mr. Ashby stated that he was satisfied with the fudge?

A. No, I don't recall that.

Q. What did he advise you?

A. He said he could use it.

Q. On page 14, lines 5, 6 and 7, showing you a copy of your deposition, and particularly lines 5, 6 and 7. A. Yes, sir, I said that.

Q. Which is to this effect:

“Q. Your recollection is Mr. Ashby said that he was satisfied with the fudge? A. Yes, sir.”

As a matter of fact, Mr. Bower, Mr. Ashby told you that he was not satisfied with the fudge, in this telephone conversation, did he not?

A. No, sir. He did say this—if you wish me to repeat it.

Q. Yes, if you will repeat the conversation.

A. He said, “The fudge is awfully messy, and after I get rid of this fudge I don't want to hear the name of fudge anymore.”

Q. Is that all he said?

A. That is all I recall. [324]

Q. I show you Plaintiff's Exhibit 7, and par-

(Testimony of Earl E. Bower.)

ticularly paragraph 4 on page 1 of that letter. Did you write that letter, and write that paragraph?

A. Yes, sir.

Q. So that Mr. Ashby did tell you that he was dissatisfied with the fudge, and that he took it on Mr. Erhart's explanation.

Mr. Rolston: Just a minute. I am going to object to this. The letter speaks for itself.

The Court: It is permissible cross examination. Go ahead.

Q. By Mr. Wheeler: Didn't he?

A. I don't recall his saying he was dissatisfied with that fudge.

Q. You did write this letter, in which you stated that Sears-Roebuck and Company called the writer 10 minutes ago to advise us that they are again accepting shipments of fudge, and are entering your invoices for payment in due course. However, they explain they were not satisfied with the fudge, but had accepted Mr. Erhart's explanation and adjustment.

A. I wrote the letter.

Q. You knew, on December 10th or December 11th, Mr. Bower, that Mr. Ashby was not satisfied with the fudge, did you not?

A. Yes, sir.

Q. As a matter of fact, you wrote to the Karmelkorn on or about December 10th, didn't you?

A. That's my handwriting.

Q. You did send this to the Karmelkorn people?

A. Evidently I did.

Q. In which you stated: We just received our first fudge. Looks O.K. Am selling hell out of it.

(Testimony of Earl E. Bower.)

Please rush another 40,000 lbs. We like, whether Ashby does or not. Signed Earl E. Bower.

A. That's right.

Q. So that Mr. Ashby was advising you he was dissatisfied with the fudge during that period of time, was he not?

A. I didn't realize it, no, sir.

Q. Until you read this letter?

Mr. Rolston: To which I am going to object as argumentative.

The Court: I think this particular question is argumentative. The letter speaks for itself. It is evident from the letter that Ashby was expressing some dissatisfaction.

Q. By Mr. Wheeler: Mr. Bower, you had some telephone conversation with Mr. Squiers, of Karmelkorn, in December, 1943, did you not?

A. Yes, I did. [326]

Q. And you had that prior to Christmas in December, 1943, did you not? A. Yes, sir.

Q. And in this conversation you told Mr. Squiers that Sears, Roebuck and Company would make a claim for the fudge, did you not?

A. I don't recall it.

Q. And Mr. Squiers told you that Karmelkorn would take care of any claim that Sears, Roebuck would make concerning defective fudge?

A. I recall that, yes, sir.

Q. He made that prior to Christmas?

A. As I recall it, he did.

(Testimony of Earl E. Bower.)

Q. So that there was a discussion with Mr. Squiers prior to Christmas concerning the defective Sears, Roebuck and Company fudge?

A. No, sir. I had cancelled my order for the fudge. I called him directly with reference to my cancellation. I wanted to return the goods.

Q. That's correct; you wanted to return the goods? A. Yes, sir.

Q. And in the discussion with Mr. Squiers the Sears, Roebuck and Company fudge was specifically mentioned as being defective?

A. No. He volunteered that in discussing our fudge [327] that I wanted returned. I says, "We will make the fudge good to anybody, including Sears, Roebuck, down there."

Q. So, at the time of that discussion, you knew that Sears, Roebuck and Company was going to make claim for defective fudge.

Mr. Rolston: To which I am going to object as argumentative, and it is not the fact, as disclosed by the conversations. It is Mr. Wheeler's conclusion of what that conversation means.

The Court: It is rather argumentative. I think he has given us his best recollection of what took place, and the rest is argumentative. I will sustain the objection.

Q. By Mr. Wheeler: You recall having several telephone conversation with Mr. Theaker in the latter part of January and early part of February, do you not? A. I think they were in February.

(Testimony of Earl E. Bower.)

Q. As a matter of fact, wasn't the first conversation prior to the 1st of February?

A. It could have been, but I don't recall it.

Q. And didn't you tell Mr. Theaker in the first conversation that you had with him, prior to the 1st of February, that you believed you could get an adjustment from the factory; and Mr. Theaker told you that at that time the factory had advised him that you had received an adjustment for all of the fudge, and you replied, "He knows different," [328] referring to Pocius or Squiers, "they called me on the long distance telephone between Christmas and New Year's. I have a record of the man's name. He is not connected with Karmelkorn. We raised the dickens that they shipped more fudge after we cancelled the shipment, and they continued to ship. I told them we couldn't sell a dollar a pound fudge after Christmas. We have been selling fudge at 89c, but it was not moving fast enough for the quantities that we got. You haven't anything to worry about. Sears have been complaining, and he says, 'We will make Sears' fudge good, too.' "

Mr. Rolston: May I have the question back?

(Question read by the reporter.)

A. I don't recall it.

Mr. Rolston: I object to the question as compound. Can you answer the question, Mr. Bower?

A. I just don't recall that conversation.

Q. By Mr. Wheeler: And on February 1st, in a telephone conversation that you had with Mr. Theaker, didn't you make the following statement:

(Testimony of Earl E. Bower.)

“That man in Chicago assured me that he would make your fudge good. Squiers, he’s the sales manager for salad dressing, and Victor of Karmelkorn, they were in together on this fudge. If you have a way of communicating with your boys in Chicago, remind them that he positively assured me, with a long distance telephone call, [329] they would make any fudge good that Sears had. He called just before Christmas.

Theaker said: “That adjustment. Does this candy have any salvage value?”

Bower: “I haven’t seen that fudge.

Theaker: “You will see it tomorrow morning.

Bower: “O. K.

Theaker: “I’ll get this wire off. I’ll have a reply by tomorrow afternoon. Inasmuch as they have had their dealing with you, I am going to advise them to make the settlement with you.

Bower: “They should make that direct with you. They can use the sugar content out of it. Maybe Sears, Roebuck can handle it in Chicago; save the transportation. But if we will get the 9,000 pounds of good fudge, we will accomplish something. They are not out anything but their labor. Mr. Squiers assured me they would make good any defective fudge that Sears Company had. He is a manager of Durkee mayonnaise. Victor Pocius flew here. He has a concession in your seven or eight stores. He sold that fudge in your store a good many years. He appeared to be a very fine man. I thought everything was O. K. We reached

(Testimony of Earl E. Bower.)

the agreement. Ashby said he could use it or I would have been glad to cover over and see him.”

Then at the conclusion did you not say: “Squiers seems [330] to have the authority. He is the man who positively assured me that he would make any fudge good to you.”

Do you recall that conversation?

A. I recall some of it. I told Mr. Theaker of the assurance by Mr. Squiers to myself over the long distance telephone that they would make any fudge good, including Sears, Roebuck, if they had some.

Q. That is correct. As a matter of fact, you saw Mr. Ashby several times during the Christmas holidays, did you not?

Mr. Rolston: By that, do you mean between Christmas and New Year's?

Mr. Wheeler: Between Christmas and New Year's.

A. I remember seeing him January 27th, and probably 28th.

Q. December 27th?

A. December 27th and 28th.

Q. Did you mention to him at that time that Mr. Pocius was coming to Los Angeles, or was in Los Angeles, to make a settlement?

A. I didn't even know Pocius was coming. He hadn't got here yet.

Q. When did he arrive?

A. I don't know when he arrived, but when he walked in our store I think it was the 29th. [331]

(Testimony of Earl E. Bower.)

Q. You did not know he was coming until he walked into your store? A. That's right.

Q. You did not call Mr. Ashby when he was here?

A. No, Ashby had not been complaining.

Q. He was in a day or two before?

A. He did not say anything, that he had some distressed fudge.

Q. By the Court: Mr. Bower, didn't Mr. Poius, in this long distance telephone conversation, tell you he was coming out from Chicago personally? A. No, sir.

Q. He did not? A. No, sir.

Q. By Mr. Wheeler: In your direct examination, Mr. Bower, you testified that it was on the occasion of December 27th, in your office, that Mr. Ashby told you that he was having difficulty with the fudge, and that it was because of the green help; that they did not like to handle the candy; that he couldn't do anything with them about it. Is that correct? A. Yes, sir.

Q. You further testified that you did not have any conversations with Mr. Ashby between the 3rd or 4th of December and the 27th of December?

A. With one or two exceptions.

Q. As a matter of fact, the conversation which you stated occurred on December 27th occurred prior to Christmas, did it not, with reference to the difficulties he was having with the fudge, and green help, and so forth?

A. I thought it was on the 27th.

(Testimony of Earl E. Bower.)

Q. On page 18, line 9—— A. Line 9?

Q. Yes. A. Yes, sir.

Q. Read the next two lines. A. Yes, sir.

Q. Perhaps you had better read through on page 19.

A. Do you mean go on with it?

Q. Yes. A. Shall I read it aloud?

The Court: No, read it to yourself.

A. Yes, sir.

Mr. Wheeler: Is it stipulated that the deposition will show the following testimony:—

Mr. Rolston: Yes, I stipulate that that portion will show that he related in his deposition that the conversation was prior to Christmas to his best recollection.

Mr. Wheeler: This is the deposition, page 18, commencing line 9: [333]

“Q. After that morning, when he gave you the cigarette order, and prior to Christmas, did you have any other conversation with him?

“A. Yes, he came in and complained that he couldn't get the girls to cut the fudge. He said, 'It's all the new help, new girls; I couldn't get them to function.' He said, 'It's terrible. The stuff is just laying there.' He said he hasn't got the support. If he had his old crew he could do something about it.

“Q. When did this conversation occur?

“A. In December, before Christmas.

“Q. Do you remember more specifically when it occurred? A. No.

(Testimony of Earl E. Bower.)

“Q. Do you recall the time of day?

“A. No.

“Q. Do you recall how long before Christmas it was? A. No.

“Q. Was there anything else said during the conversation?

“A. There could have been. I don't recall.”

Mr. Wheeler: I have no further questions.

Mr. Rolston: That is all. I will call Mr. Saxe under Section 2055, of the Accounts Payable Department of Sears, Roebuck.

The Court: We don't have 2055. [334]

RAY SAXE,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: What is your name?

The Witness: Ray Saxe.

Direct Examination

By Mr. Rolston:

Q. You are in charge of accounts payable at Sears, Roebuck and Company?

A. That's right.

Q. You were so employed approximately a year ago, during the months of November, December, and January a year ago? A. That's right.

Q. Your counsel, Mr. Wheeler, has just given me this file——

(Testimony of Ray Saxe.)

The Court: I don't presume there is any objection to his being examined, but, strictly speaking, he does not come within the section. The federal statute is much narrower than the State statute. He must be the managing agent. The manager of a department is not the managing agent. I presume he will tell the truth, if you call him, or someone else.

Mr. Rolston: I understand.

The Court: I want it understood. [335]

Q. By Mr. Rolston: You are familiar with the papers in this folder counsel gave me?

A. Yes.

Q. Did you bring with you your checks A108-592 and A125670? A. I did not.

Q. You did not bring those checks?

A. No, sir.

Mr. Wheeler: Not the checks. He has the record card of it.

A. Which numbers are they?

Q. By Mr. Rolston: I see here attached to your copy of voucher A125670, the invoices of Bower-Giebel Wholesale Company, which it covers, is that right? A. That's right.

Q. Can you tell me what date that check bears? It is down here January 13, 1944.

A. That's right.

Q. Check for \$10,274.96, is that correct?

A. That is correct.

Q. And among the invoices is invoice, Bower-Giebel, under date of November 30, 1943, 226 cases

(Testimony of Ray Saxe.)

Pan O' Butter Fudge, the total amount of the invoice being \$2,237.40, is that correct?

A. That's right. [336]

Q. That invoice was paid by that check?

A. Yes, sir.

Q. Another invoice included in the payment of that check, the next invoice, Bower-Giebel, under date November 30, 1943, 230 cases Pan O' Butter Chocolate Pecan Fudge, 18 pounds to the case, total amount of money paid on this invoice being \$2,277.00, is that correct?

A. That is correct, sir.

Q. Also paid by the same check is invoice under date of November 30, 1943, of Bower-Giebel, 230 cases, being another payment of \$2,277.00—230 cases of Pan O' Butter Fudge.

A. That is right, sir.

Q. Also paid by that check is another invoice under date of November 30th for, I believe it is, 170 cases.

A. Yes.

Q. 170 cases 18 lb. each Pan O' Butter Chocolate Pecan Fudge, the net price paid being \$1,683.00. That was paid by check?

A. That is right.

Q. Another invoice paid by the same check, dated November 30th, calling for 73 cases 18 pounds each, Pan O' Butter Chocolate Pecan Fudge, net price being \$722.70.

A. That is right.

Q. All of these invoices were paid by the check bearing [337] that date?

A. That's right, sir.

Mr. Rolston: I would like to offer this as one

(Testimony of Ray Saxe.)

exhibit. I know Sears like to keep their original records, and there will be no objection to their return after the termination of the case.

The Court: You may substitute photostats.

Mr. Rolston: This copy of voucher and check No. A125670, under date of January 13, 1944, together with the original invoices of Bower-Giebel, attached thereto, is offered.

The Clerk: That will be Plaintiff's Exhibit 14.

Mr. Rolston: I will also have marked at this time copy of voucher No. A108592, under date of December 6, 1943.

The Clerk: 15.

Q. By Mr. Rolston: Examine Plaintiff's No. 15, which is a copy of check voucher No. A108592, under date of December 6, 1943, for \$9,100.62?

A. Correct.

Q. That is an original record of Sears, Roebuck?

A. That's right.

Q. I will ask you whether or not the invoice of Bower-Giebel, under date of November 22, 1943, calling for 247 cases Pan O' Butter Chocolate Pecan Fudge, 18 pounds to the case, total amount paid on this invoice \$2,445.30, and ask you [338] if that invoice was paid by that check? A. It was.

Q. I also call your attention to invoice dated——

The Court: Cannot that be covered by an omnibus question; if he would say that check is made up of invoices attached, and giving the numbers, it will save time?

Q. By Mr. Rolston: Mr. Saxe, the invoices

(Testimony of Ray Saxe.)

which are attached to this copy of voucher were all paid by this check, is that correct?

A. That is correct, sir.

Q. Mr. Saxe, did you have a phone conversation with Mr. Ashby on or about January 12th, where he told you to stop payment on this account?

A. To the best of my recollection I did, yes.

Q. Had he ever asked you to stop the account previously to that?

A. I don't recall that he did. I may have records to the contrary, however.

Mr. Rolston: That is all.

Cross Examination

By Mr. Wheeler:

Q. Mr. Saxe, showing you Exhibit No. 3, I will ask you if you recognize that exhibit?

A. Yes, sir, I do.

Q. What is that exhibit? [339]

Mr. Rolston: To which I object. The exhibit speaks for itself. It has already been identified.

Mr. Wheeler: Just so he can identify it.

A. It is an order to me by Mr. Ashby to withhold payment of this account.

Q. Did you receive it on the date that it bears?

A. That is hard for me to state. I assume that I did.

Q. With reference to check No. A 125670, which bears date January 13, 1944, was that check drawn and issued on January 13th?

(Testimony of Ray Saxe.)

Mr. Rolston: To which I am going to object. It speaks for itself.

The Court: No; there may be a variation in dates. Overruled.

A. No, the check was actually drawn to follow out regular routine, the day before.

Q. By Mr. Wheeler: So that it was drawn on the 12th? A. That's right.

Q. At the time that you received this stop order, did you make a search for that check?

A. I would say that I did not, not knowing there was one in process.

Q. Was the check in the possession of Sears, Roebuck and Company? [340]

A. On January 13th?

Q. On January 12th.

A. Yes, I believe it was.

Q. What was the procedure with reference to its mailing?

Mr. Rolston: To which I am going to object as entirely immaterial, your Honor. The check speaks for itself.

The Court: It has a bearing upon whether this order was received while the check was in process of being sent. You say you attach some significance to the fact that these payments were made. Overruled.

A. Will you restate the question?

The Court: Will you read the question?

(Question read by the reporter.)

A. The usual procedure is to write the check,

(Testimony of Ray Saxe.)

in this case, on the 12th; it would follow through the cashier's office, where the check is put through the protectograph, and signed and mailed on the 13th.

Mr. Wheeler: I have no further questions.

Redirect Examination

By Mr. Rolston:

Q. Mr. Saxe, do you have a copy of the unpaid invoices of Bower-Giebel Wholesale Company with you?

A. No, I don't. I believe they are here. I will take that back. I do have a copy of them. [341]

Q. Will you look through these copies that you have before you, and, excluding the top one, did any of those invoices cover any fudge, except for the top one?

A. I am not too familiar with candy. However, to the best of my knowledge I will answer your question.

Q. To save the necessity of that, let us introduce the whole thing, and we can examine it.

The Court: What is the materiality of putting it in?

Mr. Rolston: The reason I want him to look through it, your Honor, is only in regard to Exhibit 3. He says he did not hold up the orders, except the one order, and the other invoices were held up and unpaid. I want to bring that fact into the record.

(Testimony of Ray Saxe.)

The Court: He is examining them. He can tell.

A. It appears that, other than the top invoice, they don't cover fudge, to the best of my knowledge.

Q. By Mr. Rolston: Nevertheless, you did hold up the payment of those invoices, did you not?

A. That's right.

Mr. Rolston: That is all.

(Short recess.) [342]

JOSEPHINE McCANCE,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Josephine McCance.

Direct Examination

By Mr. Rolston:

Q. Mrs. McCance, you are employed by Bower-Giebel Wholesale Company?

A. Yes, I am.

Q. You are Mr. Bower's secretary, are you not?

A. Yes, sir.

Q. I show you Plaintiff's Exhibit 8 in evidence, which is a copy of two letters dated November 29th, and December 3rd, both of which are addressed to the Bank of America, and have attached to them four checks. You typed those letters, did you not?

A. Yes, I did.

Q. Do you recall Mr. Ashby being present in the store on the occasions when you typed these letters?

(Testimony of Josephine McCance.)

A. I am positive of his being there on December 3rd, but I am not so sure of November 29th.

Q. Calling your attention to the letter of December 3rd, do you recall any conversation by Mr. Ashby and Mr. Bower that you overheard at that time? [343]

A. Yes, sir, Mr. Ashby came in in the morning, just before we opened, and we all went in together, and Mr. Ashby said that the fudge he had received was a little runny and moist, and the girls didn't like to handle it, but he thought if they would open the case and let it dry out, why, they could use it very easily.

Q. Was Mr. Ashby present when Mr. Bower told him to withdraw the stop-payment?

A. Yes, sir, he was.

Mr. Rolston: You may cross-examine.

Mr. Wheeler: I have no questions.

The Court: Call your next witness.

E. CARLTON BOWER,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name.

The Witness: E. Carlton Bower.

Direct Examination

By Mr. Rolston:

Q. Mr. Bower, you are employed by Bower-Giebel Wholesale Company, is that right?

(Testimony of E. Carlton Bower.)

A. Yes, sir.

Q. Calling your attention to the month of December, [344] 1943, did the warehouse in which the business is operated have a quantity of fudge on hand? A. Yes, sir.

Q. Did you examine any of that fudge?

A. I did.

Q. Did you see any fudge that was moldy, or had signs of mold? A. No, sir.

Q. How many cases do you think you looked at yourself?

A. Oh, I suppose I have looked at 25, 50 or 100 cases, sir.

Q. Calling your attention to the fudge, on or about January 11, 1944, which was brought back to the warehouse from Sears, Roebuck and Company, 1928 pounds, did you examine that fudge, or any of it? A. I did.

Q. About how much of it did you examine?

A. Approximately eight or 10 cases.

Q. Were there any signs of mold in any of those cases? A. None that I examined, sir.

Q. Do you recall whether or not part of the fudge you had on hand the latter part of December, as well as the 1928 pounds returned from Sears, were sold in the ordinary course of business?

A. They were. [345]

Q. Did you receive any complaints of any nature from any purchaser? A. I did not.

Q. Mr. Bower, you were present at various conversations with Mr. Theaker with your father?

(Testimony of E. Carlton Bower.)

A. I was.

Q. You heard your father testify concerning those conversations? A. I did.

Q. Your father's testimony concerning those conversations was substantially correct, was it not?

A. Yes.

Mr. Rolston: If you want me to go into the conversations——

The Court: I don't know that there is any need for that. I don't know that the negotiations have anything except as containing possibly admissions. I think, if there was a settlement, it was between Ashby and the other man; between Bower and Ashby; not Theaker. I don't think you should take a lot of time going over matters of corroboration.

Mr. Rolston: I think they would have some bearing on Sears' attitude.

The Court: There is no question but what they continued to do business with them. I think that is [346] sufficient, so far as this witness is concerned. You may answer the last question. Did you hear it?

A. May I have the question?

The Court: Yes. Read it, Mr. Dewing.

(Question read by the reporter.)

The Court: Let me reframe that. Is your recollection of the testimony such that if you were to answer in detail the same questions, would you testify in substance in the same manner as your father?

A. Yes.

Q. About the conversations at which you were present? A. Yes.

(Testimony of E. Carlton Bower.)

Q. Can you add anything your father may have omitted from his narrative?

A. May I say this, your Honor: I don't recall whether Mr. Bower said he told Mr. Theaker, "We don't feel as though we had any further responsibility with the fudge, because of our action of November 29th and December 30th." And that anything he did would be as an assistance to Sears with their attempted settlement with the Karmelkorn Company.

The Court: Go ahead.

Mr. Rolston: That is all.

Mr. Wheeler: I have no further questions.

Mr. Rolston: We rest at this time.

The Court: Any rebuttal? [347]

Mr. Wheeler: Yes.

MORLEY L. THEAKER,

called as a witness on behalf of the defendant in rebuttal, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Morley L. Theaker.

Direct Examination

By Mr. Wheeler:

Q. Mr. Theaker, do you recall having conversations with Mr. Bower during the months of January and February, 1944, with reference to Pan O' Butter Fudge? A. Yes, sir, I do.

(Testimony of Morley L. Theaker.)

Q. Do you recall when the first conversation occurred?

A. It would have been during the month of January; the latter part of January.

Q. How did the conversation take place?

Mr. Rolston: Just a minute. Is this preliminary?

Mr. Wheeler: Yes.

A. Well, the conversation, the initial conversation was over the telephone.

Q. By Mr. Wheeler: Now, will you state the conversation that occurred between yourself and Mr. Bower?

A. Yes, sir. I called Mr. Bower, asking him to [348] either explain by telephone or come over and see me, so that we could try to eliminate a misunderstanding that had occurred, or seemingly occurred, up to this time regarding the defective fudge.

Q. Will you go on? Just state the conversation that occurred?

A. Well, Mr. Bower advised that the responsibility was with the factory, and not with him, and I, of course, told him that Sears, inasmuch as Sears had placed the order with Bower-Giebel that Sears would hold Bower-Giebel responsible for this defective merchandise.

The Court: Was that on the telephone?

A. Yes, sir, this was on the telephone.

The Court: Go ahead.

A. Further conversation produced from me an

(Testimony of Morley L. Theaker.)

invitation for Mr. Bower to come over and sit down in my office, and try and work this problem out, and specifically to see the merchandise up to this point. Mr. Bower told me that only two representatives, Mr. Erhart and, I have forgotten the other gentleman's name, had seen the merchandise, but he had not seen the merchandise, except a small sample Mr. Ashby had presented. So Mr. Bower agreed to come to my office the following morning.

Q. By Mr. Wheeler: Was there any reference in that conversation to a telephone conversation between Mr. Bower [349] and Mr. Squiers?

A. Mr. Bower specifically mentioned that Squiers or Pocius—I have forgotten which—had assured him an adjustment would be made to the Sears, Roebuck Company.

Q. Was there any reference to the time when the telephone conversation between Mr. Bower and Mr. Pocius and Mr. Squiers had occurred?

A. Yes, sir, it was later; but it was before Christmas.

Q. Was there any discussion at that time with reference to taking the matter up with the Karmelkorn people?

A. Yes, upon Mr. Bower's visit to my office—

Q. I mean in this telephone conversation.

A. Well, I can't recall verbatim. I would say that was possibly the second telephone conversation.

Q. Then you had two conversations?

A. That's right.

(Testimony of Morley L. Theaker.)

Q. When did the second conversation take place?

A. After I had wired Chicago in an effort to determine if they had made an adjustment to Mr. Bower regarding this defective fudge.

Q. Can you fix the date of your telephone conversation, that is, the second telephone conversation? A. I assume it was February 1st.

Q. With reference to that telephone conversation, what was said at that time? [350]

A. Chicago, or our representative in Chicago, upon contacting the Karmelkorn had been advised that a satisfactory adjustment had been made with Bower-Giebel, which applied to our defective fudge, and I, of course, gave Mr. Bower that information.

The Court: Start from there, and just follow it clearly.

A. O. K. Well, I gave that information to Mr. Bower, and he disputed it and requested that I contact, or he requested that I again contact our Chicago office, and submitted to me some additional information which would refute the statement made by the Karmelkorn representative, which I did, and I subsequently received a long detailed letter in which they again assured us that an adjustment had been made to Mr. Bower.

Q. By Mr. Wheeler: In this telephone conversation on February 1st was there any reference to the telephone conversation, or a telephone conversation, between Mr. Bower and Mr. Squiers or Mr. Pocius of Karmelkorn?

(Testimony of Morley L. Theaker.)

A. Prior to Christmas Mr. Bower, in requesting that I contact the Chicago office, had assured me that he had received a telephone from either Squiers or Pocius, I don't recall which, advising that they would make a satisfactory adjustment for the defective fudge.

Q. And he stated that that conversation had occurred [351] prior to Christmas?

Mr. Rolston: That has been asked and answered, your Honor.

The Court: Go ahead.

Q. By Mr. Wheeler: Did you have any further conversation with Mr. Bower during that time, I mean during the telephone conversation?

A. I don't recall any additional information.

Q. By the Court: Did he talk to you as a result of that, when he did arrive at your place after the second telephone conversation?

A. No, after the first telephone conversation.

Q. Between the first and second?

A. That's right.

Q. By Mr. Wheeler: What visit did he make?

A. He and his son came up to my office. We sat and discussed the case to some length, and then drove to our warehouse where we inspected this 9,000 pounds of defective candy.

Q. During this conversation in your office did you tell Mr. Bower that the first half of the candy was good; that we sold all of that; that the last lot was part good and part bad?

A. I told Mr. Bower that we had sold——

(Testimony of Morley L. Theaker.)

Q. Answer the question. [352]

A. Not specifically that, no, sir.

Q. What did you say?

A. I told Mr. Bower that we had sold 20,000 pounds out of the original 29,000 pounds purchased. In other words, we had sold the good candy, and we still retained 9,000 pounds of defective candy, for which we wanted an adjustment.

Q. Was there any discussion with reference to the service from Chicago being refrigerated, the trucking service?

A. No, sir, there was not. I don't know that there was such a service on candy.

Q. Did you say that the matter should be taken up with the factory for adjustment?

A. No, sir. Mr. Bower said that.

The Court: In other words, you took the view that you had dealt with Bower, and an adjustment should be made between him and the company?

A. Absolutely.

Mr. Rolston: May I interrupt to object to the court's question as calling for the conclusion of the witness?

The Court: We are reaching the end of the case, and I have had so many versions of this conversation. We are trying it without a jury, and we have got the power in the federal court, Mr. Rolston, I think at this stage, where we have probably the last witness, to cut corners. I don't [353] want to seem critical, but you are moving very slowly.

(Testimony of Morley L. Theaker.)

Q. By Mr. Wheeler: Did you have any further conversation with Mr. Bower?

A. Yes, after receiving the final letter from Chicago, in which they gave me a detailed account of their adjustment with Mr. Bower, and assured us any adjustment we might expect would have to come from Mr. Bower, I, in turn, called him and acquainted him with this information from Chicago, and asked him to discuss it with me. At that time he terminated the conversation abruptly by stating that he and I would be unable to adjust the matter.

Q. Did you have any conversation on or about February 11th with reference to Squiers of Karmelkorn or O'Brien of Karmelkorn?

A. I don't recall, Mr. Wheeler; it would have been contained in the letters which I received from our Chicago parent.

Mr. Wheeler: I have no further questions.

Cross Examination

By Mr. Rolston:

Q. Mr. Theaker, during one of these conversations Mr. Bower did go over a series of Karmelkorn invoices and checks which paid for them, did he not? A. Yes, he did.

Q. I show the witness Plaintiff's Exhibit 4, a series [354] from 4-A to 4-M.

The Court: Those are invoices between the Karmelkorn—

Mr. Rolston: Invoices between Karmelkorn and Bower-Giebel.

(Testimony of Morley L. Theaker.)

A. That's right. I have reviewed these.

Q. Mr. Bower pointed out to you at that time that the only adjustment he received from Karmelkorn was covering his own fudge, and did not involve Sears' fudge in any way, is that right?

A. That was his contention.

Q. As a matter of fact, you asked Mr. Bower to take it up with the factory and see if the factory would make an adjustment for his fudge?

A. Certainly, I asked him to make an adjustment, and if it required negotiations with the factory it was his responsibility.

Mr. Rolston: I ask that the last portion be stricken as not responsive.

The Court: I think I will strike the entire answer. Listen to the question carefully, and if you can answer it yes or no you may do so, and then if you want to explain it, you may. Read the question again, please.

(Question read by the reporter.)

A. Not specifically in those words, your Honor.

The Court: All right. [355]

Q. By Mr. Rolston: Mr. Theaker, I show you a copy of a letter addressed to you from Bower-Giebel, which is Plaintiff's Exhibit 10, and it has attached to it a copy of a telegram. Did you receive that letter? A. Yes, sir.

Q. You did receive this? A. Yes.

Q. You also received a copy of this letter of November 29th, did you not?

A. I would have to see it, of course.

(Testimony of Morley L. Theaker.)

Q. I will show it to you.

The Court: Mr. Theaker, you did not tell us what your position is; at least I did not hear you tell us. Everybody assumes that we know as much as they do about these personalities. So will you tell us the position you occupy, which brought you into this?

A. I am the district superintendent, with headquarters in our main office here in Los Angeles.

Q. It is a part of your job to end disputes?

A. Yes, operational problems.

Q. Operational problems between the management and outsiders come to you? A. Yes.

Q. By Mr. Rolston: I hand you a copy of the letter of November 29th. You received a copy of that, did you not? [356]

A. Yes, sir, I received a copy of this.

The Court: Refresh my recollection. Which letter are you talking about?

Mr. Rolston: That is the letter when Mr. Ashby complained.

The Court: November 29th.

Mr. Rolston: Yes. I show you at this time Plaintiff's Exhibit No. 11, a letter directed to you, under date of February 11, 1944, and it has attached to it certain listings of fudge, which is directed to Sears, Roebuck, and the manner in which Bower paid for it. Did you receive that letter and a copy of the statement?

A. Yes, sir, I did.

Q. In the previous telephone conversation, to-

(Testimony of Morley L. Theaker.)

gether with that letter, Mr. Bower repeatedly told you he had paid in full the purchase price of the fudge that Sears bought, is that right?

A. Yes, sir, he told me that.

Q. Do you recall either of the Mr. Bowers,—either of them pointing out to you at the warehouse that the fudge had not been pro-rated properly; that still part of the first shipments were on hand?

A. Yes, sir, I remember, I don't recall specifically mentioning of rotation, but they did call my attention to part of the first shipment being included in the defective lot. [357]

Q. When you are referring to the defective lot, you are referring to all the fudge you had on hand?

A. I am referring to the defective 9,000 pounds.

Q. By the Court: That was returned to the stock pool? A. Yes.

Q. That is what you were talking about? You were calling it defective. You had not examined it yourself; it had been placed there from various sources? A. Yes.

Q. You were talking about that? A. Yes.

Q. But you had not individually examined the 9,000 pounds to see its condition?

A. I examined perhaps 25 or 30 cases of it.

Q. In the presence of Mr. Bower?

A. I examined possibly 15 cases in the presence of Mr. Bower.

Q. By Mr. Rolston: That was in February?

A. Yes, sir.

Mr. Rolston: That is all.

Mr. Wheeler: I have no further questions. Mr. Ashby.

The Court: Let us limit Mr. Ashby. Mr. Ashby has been back and forth with this story, and I want to limit the picture to new matters. [358]

Mr. Wheeler: Yes.

RALPH PARKER ASHBY,

recalled as a witness on behalf of the defendant, in rebuttal, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Wheeler:

Q. Mr. Ashby, did you have any conversation with Mr. Mitchell on the occasion of the visit of Mr. Mitchell on January 12th to your office, or at any other time, in which you stated that Sears, Roebuck and Company had already taken a 20c mark-down on the fudge, and that it was not Sears' policy to sell merchandise at a loss?

A. I did the first statement, that is, to the effect that Sears had already taken a 20c plus mark-down, but I did not make the latter part of the statement.

Q. Did you have any conversation with Mr. Clark after December 24th, or at any other time, in which you stated that you had over-bought on this Pan O' Butter Fudge?

(Testimony of Ralph Parker Ashby.)

A. I absolutely did not have that conversation at that time.

Q. Or at any other time did you have such conversation?

A. Nor at any other time did I make that statement.

Q. Did you have any conversation with Mr. Bower, either [359] before Christmas or after Christmas, in which you stated to him that you had over-bought?

A. I absolutely did not make that statement.

Q. With reference to this question of over-buying, do you have figures as to candy sales, or sales of the candy departments of the stores, during that period of time? A. I do.

Mr. Rolston: To which we object. I don't think it is material at all.

The Court: I don't think it is material. The question is as to the particular item in this complaint; that is what we are interested in.

Mr. Wheeler: If your Honor please, it is just to show the volume of sales.

The Court: I don't think that would bear upon the question.

Q. By Mr. Wheeler: With reference, Mr. Ashby, to your conversation on October 20, 1943, in Mr. Bower's office, was there any discussion in your presence with reference to the method of shipment?

A. There was no discussion in my presence as to the method of shipping other than the statement as to carload quantity.

(Testimony of Ralph Parker Ashby.)

Q. Now, Mr. Ashby, based upon the testimony as to the manner in which this candy was packed, and the type of fudge [360] that it was, and the method of storing the fudge, what is your opinion as to the time which this fudge should last?

Mr. Rolston: To which we object, your Honor, upon the ground that it is not proper rebuttal, asking for a conclusion of the witness.

The Court: Objection overruled.

A. In my opinion, fudge of this type should keep as a minimum, four months, and I have known specific instances where it has kept a year.

Q. By Mr. Wheeler: That is, under conditions similar to those under which this fudge was kept, according to the testimony?

A. What I would call a normal handling.

The Court: We already know this fudge was kept ordinarily in your storeroom.

A. That's right.

Q. Where the temperature was rather cool, and only from day to day various amounts were brought down to the store which, of course, was heated to a higher temperature.

A. That's right.

Q. By Mr. Wheeler: Mr. Ashby, referring to your telephone conversation with Mr. Bower on December 2, 1943, did you state, "Don't worry; I can use the fudge"?

A. I did not make that statement.

Q. Did you have any conversation with Mr. Bower prior [361] to Christmas with reference to losing your job?

A. I did.

(Testimony of Ralph Parker Ashby.)

Q. When was that conversation?

A. The exact date I do not recall. As I pointed out before, there were many times I was talking with Mr. Bower, as much as two or three times a week. I don't recall when that particular statement was made.

Q. What was the conversation that you had?

A. I don't recall the exact words of the conversation, but I can recall making that statement. I used it as a pressure, to try and get some adjustment from Mr. Bower.

Q. By the Court: Did you tell him in that conversation—I think it was already asked and denied—did you tell him in that conversation that the big shots called you on the carpet, and you over-bought this item and came near losing your job, but things were all right?

A. I testify to making the statement that I came near losing my job, but I don't testify to the statement that the big shots were all excited, because they weren't.

Q. Did you in any of this conversation intimate you over-bought this particular item; that you were being held responsible for it, and you were attempting to get your money out of it?

A. It was my job to be held responsible for it, but I did not make the statement that I had over-bought the item. [362]

Q. By Mr. Wheeler: In your conversation at the time that you took the slab of fudge that was

(Testimony of Ralph Parker Ashby.)

hard to Mr. Bower's office, did he at that time say to you, "There's nothing that I can do to the fudge"?

A. He did not.

Q. Did he at any time, prior to January 12th, disclaim responsibility for the fudge?

A. No, he did not.

Q. Did you at any time have a conversation with Mr. Bower in which you stated that the fudge was kept in rooms in which the temperature was maintained at 72 degrees?

A. May I explain that we had that conversation, but there was no specific mentioning of the degree of temperature.

Q. What was the conversation?

A. The conversation was just along the line of what the temperature was. I explained that it was cool, but the degree was not mentioned.

The Court: Did he ever intimate to you he thought you kept it too hot, and no wonder it was running because you kept it in a hot room?

A. That is correct. He brought that up from time to time.

Q. But you did not at any time agree that was the case, and that would cause the trouble, did you?

A. No, sir. [363]

Mr. Wheeler: I have no further questions.

Cross Examination

By Mr. Rolston:

Q. That conversation regarding Mr. Bower

(Testimony of Ralph Parker Ashby.)

bringing in the heat situation only came up after you showed him this piece of fudge?

A. That's right.

Q. There was no mention of any hot temperature prior to January 4, 1944?

A. Not that I recall.

Q. As a matter of fact you did not ask Mr. Bower to do anything about the fudge between November 25th and January 4, 1944, isn't that true?

A. I certainly did.

Q. When?

A. On each of the various trips that I made down to Mr. Bower's office, there was always some grumbling about the fudge.

Q. You say "grumbling"?

A. Yes, about having a lot of trouble with this.

Q. Having trouble with the girls?

A. As I explained before, that statement about trouble with the girls was only extracted from the body of my statement.

Q. That was part of your statement, though?

A. Yes, sir, that part was.

Q. As a matter of fact, though, you at no time told him that something was going to have to be done about this, between November 25th and January 4th, is that true?

A. I don't recall making that specific remark.

Q. You never asked him for an adjustment between those dates, did you?

A. I would like to qualify my answer.

Q. First answer yes or no.

(Testimony of Ralph Parker Ashby.)

A. I did not ask for a specific adjustment, because from our previous conversation we were merely settling down to the particular part of the fudge that was salable. There was no question of adjustment, because at that time I did not know how much the salable fudge amounted to.

Mr. Rolston: I move to strike out the last part of the witness' answer as a conclusion, and not an explanation.

The Court: You asked a general question, and he gave you a direct answer, and then explained it. You have given us your version of what took place when you told him about having stopped payment on his invoices, and then about dictating a letter in your presence. I don't remember whether you were asked this specific question on cross examination—whether you did not say to him, "I'll keep the fudge"; did you say that?

A. I don't remember that statement, no, sir.

Q. Relate the statement you made at the time. I am talking about the second conversation when he called in the young lady and told her to write to the bank and withdraw the stop-payment.

A. Well, sir, I can't recall the exact conversation at that time because, as I stated before, I was not too concerned about Mr. Bower individually. My recollection of the thing is that he probably called the girl over.

Q. But you told us already that you told him at that time that you would not stop his invoices?

A. Yes, that I would stop—

(Testimony of Ralph Parker Ashby.)

Q. That you would not stop them. You said you told him you had stopped them, but in fact you had not? A. I had not actually done it.

Q. You merely told him in this conversation that you had not stopped them?

A. That's right. I had not actually at any time stopped them.

Q. You did not actually stop them until you sent the note of the 12th of January to Mr. Saxe?

A. That is correct.

Q. I thought perhaps that would refresh your your recollection as to what you did say when you told him you had decided for the present, at least, not to stop his invoices, but let them go through? [366]

A. I can't recall, because, as I said, we were back and forth together continually. I know I told him that I was going along with the fudge, the salable part.

Q. You did not use the words "I'll keep the fudge"? A. No.

Q. And that you were going to do it because Erhart had shown you how it could be done, and that the suggestion was working out?

A. No, sir.

The Court: That may be repetitious, but it was not clear in my mind. It may be clear to you gentlemen. You are free to examine the witness further on the subject.

Mr. Rolston: No, your Honor, I think this wit-

(Testimony of Ralph Parker Ashby.)

ness has covered that particular thing several times.

The Court: All right.

Q. By Mr. Rolston: Did you tell Mr. Bower at any time, on either December 2nd or 3rd, that you could use the fudge all right?

A. I did not get the last part of the statement.

Q. Did you tell Mr. Bower at any time, on December 2nd or 3rd, words to this effect: "I can use the fudge"?

A. I did not.

Q. You never used such words at all?

A. No.

Q. Your answer to that is no? [367]

A. I said, "I can use the fudge that is salable."

Q. You added those words?

A. Definitely. That was the whole purport of the conversation.

Q. You added those words each time you made a remark regarding the use of the fudge?

A. If I made the remark I only made it once, and those words were on the end of it.

Q. You knew that this fudge had butter in it, did you not?

A. I don't know that it had butter in it. It said that on the label.

Q. That it had cream in it?

A. It said that on the label.

Q. You knew those items of fudge are highly perishable?

A. Are they?

Q. Do you know that?

A. Those two items are highly perishable under a certain set of circumstances.

(Testimony of Ralph Parker Ashby.)

Q. You knew that fact, did you not?

A. Yes, I knew that fact.

Q. If the butter was in large proportion as well as the cream in large proportion, that would increase its perishability, would it not?

A. Under a certain set of circumstances only.

Q. You know, as a matter of fact, that butter and cream have to be kept under refrigerated conditions to be preserved any substantial length of time?

A. I think that is general knowledge, yes.

Mr. Rolston: That is all.

Redirect Examination

By Mr. Wheeler:

Q. Mr. Ashby, if butter and cream are in fudge that is properly cooked, what is the situation with reference to the keeping qualities of the fudge?

A. That fudge should keep—and I speak as an expert; I have been in many factories where fudge has been made—that fudge should keep a minimum of from four months to a year, and if the Judge will give me one moment I can point out very definite facts about fudge. May I?

Mr. Rolston: I object to any voluntary statement of the witness.

The Witness: All right. You asked for it.

Mr. Rolston: I did not ask for it.

The Court: I think that is sufficient. I don't want to open up a new field.

Mr. Wheeler: I have no further questions. [369]

IDA FRIEDLAND,

called as a witness on behalf of the defendant, in rebuttal, being first duly sworn, testified as follows:

The Clerk: State your name.

The Witness: Ida Friedland.

Direct Examination

By Mr. Wheeler:

Q. Miss Friedland, you are employed by Sears, Roebuck and Company? A. I am.

Q. You are secretary to Mr. Theaker?

A. Yes, sir.

Q. Calling your attention to a telephone conversation between Mr. Bower and Mr. Theaker on or about February 1st, 1944, I will ask you if you made stenographic notes of that telephone conversation? A. I did.

Q. Do you have your notes with you?

A. Yes, I do.

Q. Will you read from your notes the portion of the conversation commencing as follows: "That man in Chicago"—?

A. "That man in Chicago assured me that he would make your fudge good. Squiers, he's the sales manager for salad dressing, and Victor of Karmelkorn, they are in together on this fudge. If you have a way of communicating with your [370] boys in Chicago, remind them that he positively assured me, with a long distance telephone call, they would make any fudge good that Sears had. He called just before Christmas."

(Testimony of Ida Friedland.)

Q. Does that telephone conversation begin "Mr. Bower: They should"——

A. No; that's another conversation.

Q. Will you read that portion of your notes which indicates that Mr. Bower is again talking, and they should make that direct with him?

A. Yes. Mr. Bower speaking: "They should make that direct with you. They can use the sugar content out of it. Maybe Sears, Roebuck can handle it in Chicago and save the transportation. But if we will get the 9,000 pounds of good fudge we will accomplish something. They are not out anything but their labor. Mr. Squiers assured me they would make good any defective fudge that Sears had. He is a manager of Durkee mayonnaise. Victor Pocius flew here. He has the concession in your seven or eight stores. He sold that fudge in your store a good many years. He appeared to be a very fine man. I thought everything was O. K. We reached an agreement. Ashby said he could use it or I would have been glad to come over and see him."

Q. Will you also read the next conversation with Mr. Bower? [371]

A. (Reading): "I believe they will be glad to make the fudge all good. They will work it all over. The material is still there and they can work it all over. In your night letter be sure and remind them to check and see if he has the concessions in your stores. Squiers seems to have the

(Testimony of Ida Friedland.)

authority. He is the man who positively assured me that he would make any fudge good to you.”

Mr. Wheeler: I have no further questions. You may cross-examine.

Mr. Rolston: No questions. It is exactly the same.

ELLEN HIBBS,

called as a witness on behalf of the defendant, in rebuttal, being first duly sworn, testified as follows:

The Clerk: State your name.

The Witness: Ellen Hibbs.

Direct Examination

By Mr. Wheeler:

Q. Miss Hibbs, you are employed by Sears, Roebuck and Company? A. That's right.

Q. You are Mr. McCaffrey's secretary, are you?

A. Yes, sir. [372]

Q. He is the district manager?

A. Yes, sir.

Q. Calling your attention to a telephone conversation between Mr. Bower and Mr. Theaker, did you make a transcription in shorthand of that telephone conversation? A. Yes.

Q. Can you find your notes, the part which is indicated as a conversation by Mr. Bower, and beginning: "He knows different"?

A. (Reading): "He knows different. They

(Testimony of Ellen Hibbs.)

called me on long distance telephone between Christmas and New Year's. I have a record of the man's name; he is connected with Karmelkorn. We raised the dickens that they shipped more fudge after we cancelled the shipment and they continued to ship it. I told them we couldn't sell one dollar a pound fudge after Christmas. We've been selling fudge at 89c but it wasn't moving fast enough for the quantities we got. You haven't anything to worry about. Sears have been complaining and he says he will make Sears' fudge good, too. I'll get the man's name. I believe between us we can get that outfit to make it good."

Mr. Wheeler: I think that is all.

Q. By Mr. Rolston: When was that conversation?

A. February 1st.

Mr. Wheeler: I have no further questions. I have no [373] further witnesses.

The Court: Anything else?

Mr. Rolston: No, your Honor.

[Endorsed]: Filed Jan. 14, 1946. [374]

[Endorsed]: No. 11236. United States Circuit Court of Appeals for the Ninth Circuit. Bower-Giebel Wholesale Co., a co-partnership composed of Earl E. Bower and Walter Hamilton Bower, Appellant, vs. Sears-Roebuck & Co., a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed January 19, 1946.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United States for the Ninth Circuit

No. 11236

BOWER-GIEBEL WHOLESALE COMPANY,
etc.,

Plaintiff and
Appellant

vs.

SEARS, ROEBUCK AND CO.,

Defendant and
Appellee

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF RECORD

Comes now the appellant, Bower-Giebel Wholesale Company, a co-partnership and makes this

statement of points on appeal and designation of the record required to be printed as follows:

STATEMENT OF POINTS ON APPEAL

I.

The evidence is insufficient to justify the decision and judgment in the following specifications, among others:

(1) The judgment should be for the plaintiff in the sum of \$7,738.99, together with interest at the rate of 7% per annum from January 14, 1944, against which the Court apparently has allowed a set-off in the sum of \$6,637.80;

(2) The evidence is insufficient to support the finding and conclusion that notice of any alleged defect was given to the plaintiff with sufficient timeliness and clarity as required by the laws of the State of California and of the United States Courts;

(3) That the evidence is insufficient in failing to disclose any cause for the alleged defectiveness of the merchandise involved;

(4) That the evidence is insufficient to support the damages allowed on the counterclaim in that the defendant failed to set forth all of the elements of said alleged damage.

II.

Errors in law occurring in and during the trial, including, but not limited to the following:

(1) All evidence of other adjustments of candy

other than that delivered to the defendant and appellee was not properly admitted as in being proof of whether or not candy delivered to the defendant and appellee was defective or to prove any other issue before the Court;

(2) The evidence clearly shows that the defendant and appellee, by their conduct, statements, and actions, were estopped from claiming any breach of warranty.

(3) That the Court did not properly apply the measure of damages and loss of profits;

(4) That the Court erred in finding that there was any express warranty;

(5) That the Court erred in finding that there was any express request by plaintiff for defendant to continue to receive further shipments;

(6) That the Court erred in finding that plaintiff would be required to pay defendants' losses for the unmerchantable portion of the product delivered;

(7) That the Court erred in making any finding whatsoever with regard to any adjustments made between plaintiff and the manufacturer involving candy other than that delivered to the defendant.

DESIGNATION OF RECORD

The appellant requests and designates that the entire transcript be printed, as well as all of the exhibits in that all of said record and exhibits are

necessary for a proper and full consideration of all of the points raised by the appellant.

Respectfully submitted:

(Signed) JEROME D. ROLSTON

Attorney for Plaintiff and
Appellant

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed January 31, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER ELIMINATING EXHIBITS FROM
PRINTED TRANSCRIPT

Good cause therefor appearing, It Is Ordered that the original exhibits in above cause need not be printed in the printed transcript of record, but will be considered by the Court in their original form.

(Signed) FRANCIS A. GARRECHT

Senior United States Circuit
Judge.

Dated: San Francisco, Calif., February 12, 1946.

[Endorsed]: Filed February 13, 1946. Paul P. O'Brien, Clerk.

